

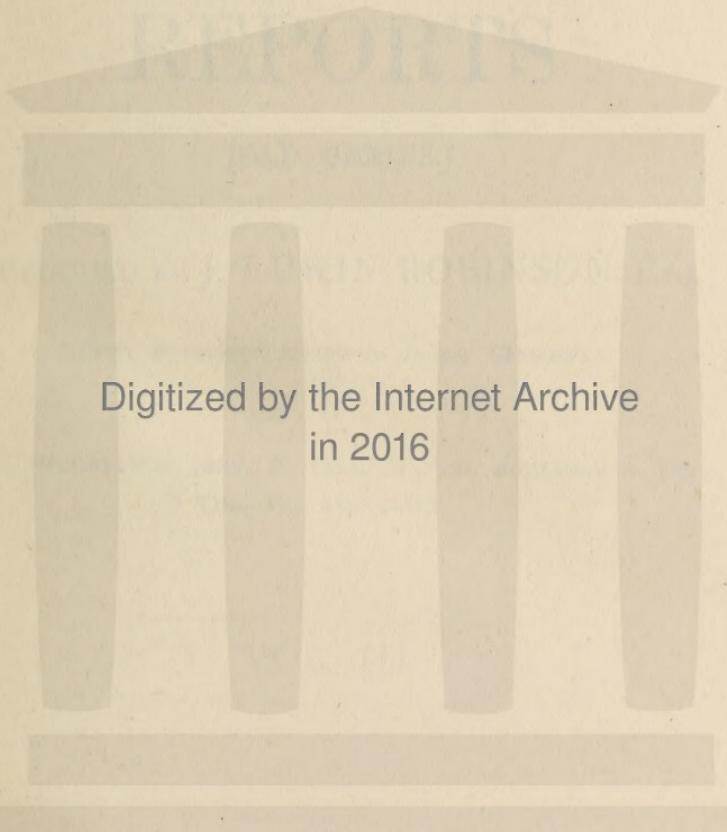
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QUEEN'S BENCH
AND
PRACTICE COURT
REPORTS

[OLD SERIES.]

PUBLISHED BY J. LUKIN ROBINSON, Esq.

(*From Manuscript Reports in Judges' Chambers.*)

FROM MICHAELMAS TERM, 3 WILL. IV., TO MICHAELMAS TERM,
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Upper Canada Reports

OLD SERIES.

(Commencing from the end of Mr. Draper's Volume of Printed Reports.)

IN THE KING'S BENCH.

CASES DETERMINED IN MICHAELMAS TERM, 3 WILL. IV.

Present,—THE HON. CHIEF JUSTICE ROBINSON.

“ MR. JUSTICE SHERWOOD.

“ MR. JUSTICE MACAULAY.

RICHARD LEONARD, ESQUIRE, SHERIFF OF THE DISTRICT
OF NIAGARA, v. JOHN McBRIDE AND JOHN LAX.

In a declaration on a bond to the limits, given by a debtor in execution, it is necessary to shew the judgment, writ and arrest of the debtor, and the execution of the bond while he was in custody, and the recital of these facts in the bond set out in the declaration will not be sufficient.

Debt upon a bond given to the plaintiff as sheriff, conditioned that one Thompson should not go beyond the gaol limits, he being a person in custody in execution. The declaration stated the bond, setting out the condition not *in hæc verba* but according to its legal effect. A breach of the condition was then assigned, by which (as is alleged) the bond became forfeited and a right of action accrued to recover the penalty. To this there was a general demurrer; and on argument, by the Solicitor-General for the plaintiff and Sullivan for the defendants, the following exceptions were taken to it—that it should have been set forth that the original plaintiff recovered a judgment against the original defendant, and that he thereupon sued out a *ca. sa.*, under which the plaintiff arrested him and had him in custody in gaol when the bond was given.

This case was argued last term, but as there was a difference of opinion in the court judgment was deferred, and this day the judges pronounced their opinion as follows :

ROBINSON, C. J.—This is an action upon a bond given by the defendant to secure the plaintiff, who is sheriff of the District of Niagara, against the escape of one David Thompson, a debtor admitted upon the gaol limits.

The declaration is demurred to generally, upon the ground that it is substantially defective in not positively

alleging all that is necessary to sustain the plaintiff's action upon such a bond.

Our Gaol Limits Act, 2 Geo. IV., ch. 6, for the relief of persons imprisoned for debt, allows certain limits to be added to gaols, and provides that debtors may remain at any place within such limits without subjecting the sheriff to any action for escape. But the sheriff is not bound to allow the debtor such limits, unless he shall give him security. The effect of these provisions is, to make the limits part of the gaol, as far at least as the rights of the creditor are concerned. No wrong is done to him while the debtor keeps within them—he is to be regarded as in gaol, and the legislature has humanely dispensed with the necessity of more rigidly observing the injunction of keeping debtors *in arcta et salvâ custodiâ*. But so far as the debtor is concerned, and the sheriff as his keeper, there is still a difference between these limits and the actual gaol. The sheriff may allow the debtor to enjoy them or he may not ; and in this respect he has it in his power to show the debtor ease and favor, for he may, without exacting any security or any consideration, permit him to go upon the limits, if he is willing to incur the risque. On the other hand, he may refuse to do so when security is offered, or besides security he may exact from the debtor or his friends a compensation in money or other thing before he will grant the indulgence ; or in consideration of such compensation he may dispense with security. It is obvious therefore, that sheriffs *may* make this power of granting or withholding the privilege of the limits, the occasion of that kind of extortion which the 23 Hen. VI. c. 9, was intended to restrain.

If for instance the sheriff should, in consideration of allowing the limits, exact a bond from the prisoner that he would convey to him a certain lot of land, or pay him absolutely a certain sum of money, such an obligation, I conceive, would undoubtedly be void. The objects and the extent of the statute 23 Hen. VI. are fully stated in Dyer v. Manningham, Plowden, 67. If the sheriff then, upon the occasion of allowing the limits, will take such a security as he can enforce, he must, as I conceive, take

LEONARD V. M'BRIDE.

such a one as our statute 2 Geo. IV. c. 6, contemplates and allows—a security which he may if required assign, and upon which he or the creditor may sue in case the debtor shall withdraw from the limits, and “may recover such “sum of money as the debtor was confined for, together “with such costs and damages as he may have sustained “by reason of such debtor withdrawing from the limits.” The act prescribes no form of security, nor does it state in terms what condition shall be annexed to it. The plaintiff in the case before us has taken a bond, which he declares upon, setting out the condition not *in hæc verba*, but according to the effect, and he then proceeds to assign the breach of the condition whereby the bond as he says, has become forfeited and he is entitled to recover the penalty. It would be more consistent, I think, with the statute, instead of a bond with a penalty, the sheriff were to take a covenant to indemnify him, and then the recovery might strictly accord with the second section of the act. The usual course, however, has been, to take an obligation with a condition, as in this instance, and the right to do so has not been objected to. According to the case of Lenthal v. Cook, 1 Saunders, 161; 1 Levinz, 254, and various other cases, the plaintiff suing upon a bond like this taken by him as sheriff, is not under any necessity of disclosing the condition in his declaration, but he may, as in other cases between ordinary parties, declare on the bond simply. If he had done so in this instance, and the defendant had demanded oyer and set out the condition with the recitals by which it is introduced, and having done so had denied that there was such a writ as the condition recites, or that the debtor was in custody upon it, or any one fact which is stated in condition, it might then have been contended upon the general principles of pleading and evidence, that all the other facts which are stated in the condition, and thus placed upon record, must be taken to be admitted by him, inasmuch as he had not denied them, but relied upon other matter.

The plaintiff, however, in this case, as is usual in suing upon bail bonds and bonds for similar purposes, has disclosed his real cause of action fully—that is he has pro-

ceeded to state the occasion upon which he took this bond, the condition to which it was subject, and the breach of that condition ; and the question now is, since he has shewn that he as a sheriff took this bond in virtue of his office from a debtor in his custody, has he shewn enough to make it appear that he has a right to sue upon it ? If he has not, he can no longer, in my opinion, treat it as a simple bond, and advance a claim to the penalty, as a debt, because he is bound to shew that this is a security which a particular statute authorizes him to take under particular circumstances and for a particular purpose ; and we know also, that upon such a security he can only recover such a sum as the debtor was confined for, together with such costs and damages as he may have sustained by reason of the escape : his claim is limited to those damages, and in my opinion the operation of this statute, and of the statute of William and Mary, compelling the assignment of breaches where the bond appears to be upon condition, render it incumbent on him to go on and shew how the condition is broken. To do this it seems to me indispensable that he should aver, by way of inducement, that the plaintiff in the original action had recovered a judgment against this debtor; that for levying it he had taken out a *ca. sa.*, endorsed, etc., whereupon the debtor had been arrested and in custody ; that being so confined he had obtained the benefit of the limits, on which occasion the present defendant had made the bond now sued on, with the condition such as he has here set it out, and then by assigning a breach he shows a complete cause of action. I do not say that the plaintiff was bound in the first instance to have stated the whole of his case, and that he might not have left it to the defendant to elicit it on oyer, and then to defend himself as he might ; but he has disclosed the real nature of his cause of action, and fails to state fully his right to sue upon it. He contends that he has done this by having introduced on the record the condition of the bond in which the defendant has recited these facts (except indeed the statement of a judgment, which is wholly omitted)—that is, he contends he has set out sufficient when he has stated in his declaration, that to the bond he is suing for there is a

condition, in which is recited to the effect following:—
“Whereas David Thompson, therein mentioned, is in the
“custody of the sheriff of the District of Niagara, at the
“suit of Robert Kay, upon a writ of *capias ad satisfaciendum*,
“endorsed for £29 8s. 9d., and the sheriff’s own fees, and the
“said David Thompson is desirous of having the benefit and
“advantage of the limits of the gaol of Niagara, in the said
“district, appointed and determined by an act or acts of the
“legislature of this province;” and then the condition of
the bond is stated to be, that if the said David Thompson
should be and remain within such limits as aforesaid so
appointed and determined as aforesaid, without subjecting
the sheriff of the said Niagara District to any action or suit
for an escape from the gaol, or limits of the gaol of the said
district by the said Robert Kay, his executors, administrators
or assigns, then the obligation should be void.

Now in this recital it is not alleged, that there was any judgment to warrant the execution; it is not stated from what court the execution issued; it is not stated that the debtor was admitted upon the limits, further than we may gather it from the statement in the breach, that he departed from them, which implied that he had first been on them. I think the plaintiff was bound to have averred that there was a judgment against the debtor, upon the principle so clearly laid down in *Jones v. Pope*, 1 Saunders, 38. Unless there was a judgment, the plaintiff could sustain no action as the assignee of such a bond. It is true, it is the sheriff here that sues, because he has not been called on to assign the security to the plaintiff; but the statute clearly gives him a right to take security for no other purpose than to indemnify him against the claims of the plaintiff. It is the damage to the plaintiff that lies at the bottom of the whole remedy; and surely it is as necessary for a sheriff to aver a judgment as for the plaintiff, because he could never be allowed to receive and keep upon such a security a sum of money that the plaintiff could make out no claim to. If therefore the recital in the bond could stand in the place of a necessary averment in the declaration, still there being no judgment recited, we have nothing to supply the averment of a judgment, which in my opinion was necessary. But I think

no part of the inducement is sufficiently alleged in this declaration. It is not enough, in my opinion, for the plaintiff to aver that the "*defendant has admitted*" that there is a *ca. sa.*, and that the debtor was in custody upon it—he should himself have stated these facts positively and not argumentatively. His right to recover depends upon the *existence* of those facts, not upon the defendant's having admitted them *to exist*—that to be sure is a medium of proof, but the right of action rests upon the *fact*, the admission is evidence of that fact ; and I am not prepared to say, that it is in such a case as this incontrovertible evidence. However that may be, I take it to be a principle in pleading, that the plaintiff must allege distinctly and positively in his declaration all that is necessary *prima facie* to sustain his action, and that he is not relieved from this necessity by any estoppel arising from the defendant's admissions. The facts of a *ca. sa.* having issued, and the debtor being in custody upon it, are facts necessary to be shewn by the plaintiff in order to sustain his action upon a bond like this, where it has appeared to the court upon the record that it is a bond which the sheriff has taken by colour of his office. They are not merely such facts as may be presumed, leaving the want of them to be urged on the part of the defence. Nothing that is introduced into this declaration, merely as being recited in the bond, is so alleged that it could be traversed. If the defendant desired to deny the existence of a *ca. sa.*, or the fact of the debtor being arrested, he could not say that a *ca. sa.*, did not issue as the plaintiff has alleged, for he has alleged no such thing.

It is evident, I think, that the defendant is not estopped by the recital in his bond from controverting the existence of any thing there stated which is essential to the validity of the bond.—2 T. R. 169; Sayer, 116. In ordinary cases between party and party, the recital in the condition of any particular fact, is binding upon the obligor, so that he is estopped from denying it, and upon this principle—that supposing the fact does not exist upon which the condition depends, the consequence is, that the condition or defeasance falls to the ground, and the bond stands against the obligor as a single bond. But that cannot be so here. The sheriff can

take no single bond *colore officii*. The case of Samuel v. Prosser recognizes that point; and by reference to 10 Mod. 139, and Hardr. 464, 465, it will be seen, that a bond which is void as being against the 23 Hen. VI. c. 9, cannot be made good by estoppel. The defendant having admitted in recital any fact essential to its validity, does not preclude his afterwards averring the non-existence of that fact.—2 T. R. 169. There is no estoppel against an act of Parliament; and if the defendant can deny these facts, they are material to the plaintiff's action, and should be shown by him positively in his declaration, in order to shew that he had a right of action. There may be other facts material to the plaintiff's recovery, which are of a nature to be presumed until the contrary is shewn by the defendant, and on this principle the judgment of the court proceeded in Wilson v. Hobday, 4 M. & S. 125; but the existence of a judgment, the issuing of a *ca. sa.* upon it, and the imprisonment of the debtor, are in my opinion facts to be shewn by the plaintiff, before he can claim to have this bond, taken by him in his office, considered a valid bond. When I say shewn, I mean that in the first instance they must be asserted on record, when the plaintiff undertakes to state all that is necessary to sue for breach of the condition; whether the defendant, having admitted the facts in his instrument sealed by him, will not entitle the plaintiff to consider them as established, at least until they are disproved, is another matter. Assuming that it will, that will only shew that the plaintiff may venture to affirm it directly and positively, not that he is relieved from doing so. The cases in 2 Marsh, 280, and 13 Ea. 63, shew that when a plaintiff has occasion to aver facts which are admitted by the defendant under his seal, he does not content himself with averring that the defendant has admitted them but, as in all cases of pleading, he affirms the fact directl and positively. I know no instance to the contrary, and I conceive it to be a plain principle of pleading, that although a party may be estopped by a recital from denying a particular matter, it is not the less necessary for the other party to state it positively.

SHERWOOD, J., concurred.

MACAULAY, J.—It is contended this declaration is insufficient to sustain the action, inasmuch as it does not aver—
 1. That the original plaintiff recovered a judgment against the original defendant. 2. That a *ca. sa.* issued thereon, under which the plaintiff arrested him, etc. 3. That the original defendant was in custody *in gaol* when the bond was sealed. 4. That the *recital* to the condition of the bond does not allude to any judgment, and is not, as set out, any sufficient averment of the *ca. sa.*, arrest, etc., though necessary to be averred. I am constrained to hold the declaration sufficient on general demurrer, and that the want of a judgment *ca. sa.*, arrest, etc., if any of them could constitute a valid defence, should be pleaded as matter of defence by the defendant rather than averred by plaintiff.—Willes, 461; 5, T. R. 195; 3 M. and S. 180: 13 Ea. 63; 7 Price, 550; 8 T. R. 463; 8 Ea. 80; 2 Saund. 181, b. c. It is a rule or maxim in pleading, that a covenant or contract may be laid in the terms of the agreement, when of itself sufficiently certain and intelligible, and that a breach may be assigned in terms equally general and comprehensive.

It is a rule of law, that a sheriff may take a bond from a prisoner in execution for abiding in confinement but not for *ease and favour*, and that if it appear to have been given for ease and favour, the instrument is *void* and the defence available on demurrer. But it is provided by our provincial statute, 2 Geo. IV. c. 6, sec. 2, that the sheriff may take security for the gaol limits from any prisoner confined for debt, which security, in the event of an escape, may be enforced by the sheriff himself against the sureties, or be assigned to the original plaintiff, and be recovered upon by him suing as assignee under the statute. The present bond therefore, on the face of it, is legalized, and is in its terms sufficiently certain. It is not pretended to be *void* by reason of any defect or uncertainty. It is a penal bond, and is prosecuted not by the assignee, but by the obligee himself.

It is a general maxim of law, that a chose in action cannot be assigned, and that an assignee cannot sue thereon, but bail-bonds and bonds for the limits may be assigned. Until the stat. 23 Hen. VI. c. 9, a sheriff could not bail on

mesne process ; and until the stat. of 4 Anne, c. 16, he could not assign the bail bonds. Since the last act, most cases in the books are between the bail and the sheriff's assignees. Antecedently the action was necessarily brought by the sheriff himself, or at least in his name. In the event of a negligent escape from gaol, I take it, the sheriff may prosecute the fugitive debtor, though no security had been given ; and I do not find that in case for an escape the original judgment must be shewn by the sheriff ; and though the case in Cro. Eliz. 53, recites the original judgment, it is not anywhere adjudged essential—3 E. 385. The sheriff would have to recite the *ca. sa.* as inducement to his action—without shewing it he could not sustain the suit. In justifying under process, a sheriff need not shew the original judgment, though the plaintiff must.—3 Lev. 20 ; Str. 509, 933, 1184 ; 1 Wils. 17 ; 1 Salk. 409.

I take it also to be clear, from the books, that when the sheriff sues, he may declare upon the bond as a single bond in the first instance, though it describe him as sheriff, because it would not appear necessarily on that account illegal and void, and the condition would not be at first exhibited. And that if upon setting out the condition on oyer, though it appeared to be a bail or limit bond, the defendant could not demur for that reason, nor unless it appeared by something in the instrument that it was void, when he might do so. At the same time when an assignee sues, being only enabled by the statute to do so, he must by inducement, stating the judgment, *ca. sa.*, &c., lay a foundation for the sheriff's right to assign and his right to sue. Without those circumstances, it would appear he could not sue as assignee ; and on general demurrer his declaration would be held ill. The sheriff sues at *common law* upon his bond. The assignee sues by special leave of the statute as an assignee. The one requires a substratum for his suit, the other does not. The cases in the margin shew that the sheriff may declare on the limit bond singly, and need not necessarily in the first instance shew the condition or suggest a breach.—1 H. Bl. 31 ; Com. Rep. 553 ; Moors. 597 ; 2 H.B. 418 ; 2 T.R. 573 ; 4 T.R. 505 : 1 Vent. 237 ; 2 Vent. 234 ; 1 Saund. 156 ; 1 Saund. 161, 318 ; 2 Saund. 59 b. to

61 ; Hard. 464 ; 2 Bl. 955 ; Carth. 301 ; Plowd. 60 ; 1 Lev. 254, 209 ; 1 Sco. 383 ; 1 Ld. Ray. 349 ; Cro. Eliz. 672, 808, 862 ; Lutw. 682 ; Cro. Eliz. 646 ; 2 Salk. 438.

Though the plaintiff may declare on the bond singly, yet if in setting out a breach he does not shew a sufficient breach, the objection is good to the whole count on general demurrer.—Hob. 12, 13. But in suggesting a breach, time and place are generally matters of form, only exceptionable on special demurrer. If it is conceded that the plaintiff might declare on the bond simply, it follows that no inducement (as setting forth a judgment, *ca. sa.*, &c.,) was necessary as a foundation for his action. The omission does not entitle the defendant to demur, because it appears to be a limit bond, for the bond is not therefore, and does not on record appear to be, void. But if such inducement be necessary in any stage of the proceedings as a foundation of the suit, it should precede the statement of the bond, or at all events appear in the declaration, or defendant on oyer shewing the condition might demur for such defect. It follows that the existence of a judgment, issue of a *ca. sa.*, arrest, &c., are not essential as the basis of the suit. The bond is the basis of the suit, and *prima facie* supports it. It is only liable to exception on general demurrer, before any breach assigned, when it appears on the face of it to be *void*. If only liable to be *avoided* by reason of some collateral fact, such matter must be pleaded as a defence, for till then it does not appear on the record.

When the obligee founds his action on the bond, it seems to me not incumbent upon him to shew in his declaration (when restricted to the bond, and assigning no breach,) all those circumstances essential to have authorized the plaintiff to take such a security. The court will not hold it void, unless it *appears* for what reason it is void—*prima facie* it is legal and valid. If this view be correct, it follows that the whole force of the objection goes to impeach the sufficiency of the breach assigned, and not to invalidate the bond itself in its original inception; except so far as it is liable to be defeated in this suit, because no sufficient breach is shewn. Then is the breach defective? The plaintiff introduces it by stating the bond to be subject to a condition, whereby—

i.e. by which condition—after reciting to the effect following, “Whereas,” &c., (in the terms of the condition) the recital assumes and admits that a *ca. sa.* had issued against the original defendant, indorsed for 29*l.* 8*s.* 9*d.*; that the defendant had been arrested thereon, was in the sheriff's custody, and desired the benefit of the limits, &c. Then follows the condition of the contract—that he should be and remain within such limits without subjecting the plaintiff to any action for an escape. So far it shows the contract in full and clear terms. The breach alleged is in the negative terms of the contract—that he did not be and remain on the limits, &c., but departed therefrom, and then follows the injury or damages, whereby plaintiff was subjected to an action, and had to pay the debt.—3 Ea. 386.

In assigning the breach, I do not think the plaintiff bound to set forth the original judgment. He was bound to arrest without it, could justify without it, and might pay the debt after the escape without searching for it. He might rely on the *ca. sa.* There was no privity between him and the original plaintiff, but there was between the original plaintiff and the original defendant; and if there was no judgment, it should be urged as matter of defence, if available. The condition is sufficiently clear and full without it. As to the *ca. sa.* and arrest, they are recited and admitted in the condition, and it would if necessary be presumed the defendant was in custody *in gaol*, and that he was on the limits, as otherwise he could not, as alleged and admitted by the demurrer, have escaped therefrom.

I shall presently attempt to shew, that had the condition contained no recital of the *ca. sa.*, &c., so that the breach could not be intelligibly suggested without some inducement referring thereto, yet such inducement could only be important for the purpose of applying the condition and breach thereto, to render it intelligible and certain, and not as indispensable for the support of the action. The gist of the action is the bond—the gist of the breach is the escape. I would first, however, submit, that most probably the defendant is estopped from denying a *ca. sa.*, arrest, &c., which the bond recites. *Prima facie*, at all events, I think they appear and stand admitted. The recital admits the

fact on the record, and I take it to be a rule of law, that if any facts which the defendant is estopped from denying appear on the record, the plaintiff need not substantially aver their existence as facts material and susceptible of being traversed. It would seem superfluous to aver what already appears, and what it also appears the defendant could not deny. At all events, when matter of estoppel already appears on the record, the plaintiff need not plead the estoppel, but may rely on it on general demurrer ; as if in this case the defendant is estopped from denying a *ca. sa.*, and yet had pleaded no *ca. sa.*, the plaintiff need not have pleaded the estoppel, but might have demurred, because by setting out the recital and the condition, it would already appear of record.—3 T.R. 439; 4 M. & S. 125; Cro. Eliz. 366; Co. Lit. 303, b.; 1 Salk. 277; Str. 817; Lord Ray. 1154; 2 B. & C. 662; 2 B. & P. 299; 5 B. & A. 682; 3 T.R. 374; 1 Saund. 316, 325, n. 4, 215, n. 2; 2 Keb. 471; Aleyn, 13, 52; Cro. Eliz. 756, Dy. 196, a.; 2 Rep. 335; 6 T.R. 62; Willes 9, 461; 5 B. & A. 682; 1 Salk. 7; Barnes, 94; 1 B. & C. 704; Bull. N. P. 298.

It is very clear that a recital of specific facts in the condition of a bond, does estop the obligor to deny them afterwards as a general rule. The application of the rule to this case is only questionable by reason of the bond being one not sanctioned at common law but by statute, which requires that there should be a *ca. sa.*, and against which there can be no estoppel, as held in 2 T. R. 171; 3 T. R. 440; or upon the principle, that to estop a defendant from denying a *ca. sa.*, if there was none, would be so glaringly unjust that the rule could not extend to such a case ; and yet it is the peculiar nature of all estoppels, that they conclude the party from shewing the truth. It is true, the doctrine has its origin in concluding parties when the exclusion of the truth is consistent with the *justice* of the case, still it will be found to have been more extensively applied. The estoppel here is not, however, against an act of parliament, and it is not alleged to be against the truth. The act authorizes a limits bond after a *ca. sa.* It does not say in express terms that the bond shall be void if there be no *ca. sa.*, or that there shall be a *ca. sa.*, before the sheriff can accept a bond. The

instrument would be void at common law, upon common law principles, and the present is easily and widely distinguished from the case above cited in 2 T. R. 171. The estoppel would not be contrary to the statute. The statute does not prohibit a bond or declare it void in the absence of a *ca. sa.*—it legalizes such bonds. The bond would be void at common law, because indulgence to prisoners was not sanctioned. The statute sanctions it. At common law, however, such a bond would not be void, unless it appeared or was shown in pleading to be for ease and favour. Under the statute, ease and favour, so far as respects the gaol limits, are sanctioned and the bond authorized. If there was a *ca. sa.*, the bond is valid under the act; and if the defendant is estopped from disputing the *ca. sa.*, the fact stands admitted. The plaintiff can only recover the amount of the *ca. sa.* and damages under the statute. The *ca. sa.* must consequently be shewn to warrant such recovery; but the necessity of shewing the fact, does not affect the manner of doing or proving it: it may be alleged substantively or appear by estoppel. If the defendant is concluded as to the fact by estoppel, it nevertheless appears in that way to the court that there was a *ca. sa.*. The record shows there was such a writ, and I conceive nothing more is required. His being estopped is not against the statute, it is collateral thereto; and as respects the act, the only question is, was there a *ca. sa.* or not? That fact may be shewn by estoppel, as well as in any other way. To introduce the defence of ease and favour, a legal arrest would seem necessary to be shewn by the prisoner, and the forms evince that it is always done, for if there was no legal arrest there could be no ease and favour. If the party, being in illegal custody, gave a bond to abide within certain limits under a certain penalty, such bond would not be necessarily void unless for *duress*, or as being against public policy; but to recover the amount of a *ca. sa.* under the act, of course a valid process would be essential. Why may not such process be shewn by estoppel as well as by substantive averment, consistently with the terms and provisions of the act? And if for want of a *ca. sa.*, the sheriff would not be liable to the original plaintiff,

whereby he could have no claim to protective damages from the prisoner, certainly it would be for the latter or his bail to show such matter in bar of damages ; and even then the sheriff might have a legal right to recover other damages, as, to reimburse himself expenses incurred by reason of the escape, for the act does not restrict his recovery to the amount of the *ca. sa.* exclusively, but entitles him to "all such costs and damages as he may have sustained by " reason of such debtor withdrawing from the limits."

After all, I do not say the defendant is estopped from denying a *ca. sa.*, though as a plea in bar, I incline to think so. All I contend for is, that the plaintiff need not aver it. If susceptible of denial, it must be by plea—*prima facie* at least the sealed admission of the defendant should be taken as true. The *ca. sa.*, arrest, &c., are assumed facts, introductory to the agreement, and may be equally assumed in alleging a breach thereof. Adjudged cases are not readily met with, and the forms of pleading vary. It will be often found, that certain specialties are declared on, containing recitals ; the facts recited are not averred, but introduced on the record by rehearsing the recital, after which the party at once proceeds to the gist of the action. In Gambier v. Larkin, a case of debt on bond not to escape, &c., no allusion is made to any judgment or *ca. sa.*, but the report is not full.—Com. Rep., 553.

The case of Jenkins v. Hancock, 1 Sid. 30, is more in point : debt on bond for performance of covenants made by a bailiff or under-gaoler. The covenant was, that the defendant should not admit at large any *prisoner arrested*, or who should be arrested, without leave of the plaintiff ; and the breach assigned was, that the defendant had suffered to go at large, at Westminster, without warrant of plaintiff, one who was arrested, but he did not shew the time and place of such *arrest*. It was contended the declaration was bad for this reason. Windham, J., at first doubted, but afterwards changed his opinion, and he and all the court held the declaration good, for that the escape or the going at large was the material part of the covenant, and the mode or manner of the arrest was not in question, nor any part of the

covenant; and (as I understand it) whether he was legally taken and imprisoned, was not material, when he was suffered to go at large, for that was the substance of the covenant, and that was alleged to be at Westminster.

It is said plaintiff should aver a judgment, *ca. sa.* and *arrest*, &c., as *inducement*, not to the action on the bond, but to the breach of the condition. Now an inducement will be found generally requisite for the purpose of explanation—sometimes as laying a foundation for the suit, but it is always collateral to the gist of the action. In the present case, if required at all, it could not be wanted as a foundation for the suit, but to lead to and explain the breach—at least, so I conceive. It is held of essential importance to sustain the action on the ground, that if there was no *ca. sa.*, there could be no breach. It does not, follow, in my view. The breach consists in leaving the limits, which might be done, though there was no *ca. sa.*. I admit, that if it appeared there had been no *ca. sa.*, it might then follow that the bond could not be enforced; not because there was *no breach*, for in point of fact there was a breach, but because it would be seen by the court that the bond itself was void in its inception, or at least not authorized by the act wherefore the breach would become unimportant and unavailable. The want of a *ca. sa.* would form matter of *avoidance*, and it would go not to negative the breach, but to defeat all remedy; therefore, indirectly, by sapping the foundation of the suit, by destroying the bond. The bond being shewn to be void, there could no longer be any breach in law to sustain a recovery, there being in law no bond, and consequently no condition. It is manifest in any point of view, that the want of a *ca. sa.*, if it would operate, must do so by destroying the obligation under the statute, and it should therefore be pleaded. *Prima facie*, it is not to be presumed there was no *ca. sa.*; and as respects plaintiff's action, it therefore need only be alluded to by him as inducement to explain the condition, which the *recital* in the present case sufficiently does, introduced as it is on the record. Had there been no such recital, and the bond not been void for the uncertainty of the condition, the plaintiff would then have been obliged to recite

the writ, &c., as collateral matter, and as inducement to explain the *breach*, &c., not to sanction or sustain the bond itself, and to shew the breach of a valid security, but merely to enable him to apply the condition and breach to the proper suit and subject matter.

Whenever it appears there was no judgment, *ca. sa.*, arrest, &c., the bond may be held void; but why should it be deemed void because it does not appear by substantive averment that there was a *ca. sa.*, &c.? or why should such a circumstance invalidate the *breach* any more than the *bond*? If a *ca. sa.* is to be presumed *prima facie quoad* the *bond*, why not equally *quoad* the *breach* thereof? The action is on the *bond*—the *bond* sustains the action, and (if so) the *breach* can only be impeached for uncertainty, or some defect therein, not invalidating but evading the penalty. The *bond* cannot be destroyed through the *breach*, unless the *breach* assigned be insufficient in itself, or shew the *bond* void. It does not here show the *bond* void, nor is it substantially defective in itself. There is no fatal want of certainty, and it does not evince the existence or non-existence of anything avoiding the *bond*, any more than the condition *per se* would, if set out on *oyer* without any alleged *breach*; as if plaintiff had declared singly, and defendant had set out the condition on *oyer*, and demurred. But it has been shewn, that had the plaintiff declared singly, the defendant could not have prayed *oyer*, and *demurred*. The *breach* is sufficiently assigned, without any inducement, for this obvious reason—the condition recites the *ca. sa.*, etc.; that dispenses with the necessity of an independent averment, and enables plaintiff to point his *breach* without rehearsing the *writ*. Had there been no recital it would have been otherwise; but then the inducement would be required, not to support the *bond*, but to explain and point the *breach*, for no other reason. He need only shew the *ca. sa.* as explanatory, not as the substratum of his action. As respects the right of action, the want of it would constitute a matter of defence, if open to negation and warranted in point of fact.—

4 Manning & Ryland, 422.

Per Cur.—Judgment for the demurrer.

MACAULAY, J., dissentiente.

LEONARD V. PAWLING.

When a plaintiff's damages were assessed at a less sum than the evidence appeared to warrant, the court, at his instance, ordered a new assessment, on payment of costs of the day.

In this cause damages had been assessed at the last assizes in the Niagara District. The jury found for a sum very much less than the evidence adduced warranted, and did not allow any thing for a very large account, which there was evidence to prove the defendant had admitted ; and *Dickson*, on behalf of the plaintiff, moved to set aside the assessment of damages, in order to submitting it to another jury, which, after consideration when the rule nisi was returnable, was ordered, on payment of the costs of the day.

Per Cur.—Rule absolute.

KILBORN V. WALLACE.

When damages were assessed at a sum within the jurisdiction of the district court, on a promissory note which had been reduced to that amount by payment made after action brought, the court ordered the master to tax the plaintiff his full costs.

Damages had been assessed in this cause at the last assizes for the Johnston District, for a sum within the district court jurisdiction. The action was brought for a sum exceeding 40*l.*, which it had appeared was reduced by endorsement made after action brought. The plaintiff's counsel omitted to move for a certificate at the time of the assessment, though the application was made the same day ; but *Sherwood, J.*, refused it, as being made too late, if it were necessary to make it under the statute.

Draper applied for an order to the master to tax full costs, contending that the case of an assessment did not come within the statute at all ; and therefore, were it not for the rule of Easter, 11 Geo. IV., full costs would be taxed, as a matter of course. On the merits, he urged, the plaintiff was entitled to costs, as it appeared on the record, the promissory note which was the foundation of the suit was beyond the district court jurisdiction. The court granted a rule nisi, and afterwards made it absolute : The Chief Justice

remarking, however, that he concurred because it appeared the plaintiff's demand was reduced within the district court jurisdiction after action brought.

Per Cur.—Rule absolute.

SMITH V. LAWRENCE.

Where the plaintiff, a Quaker, resident in Yew York, made an affirmation of his claim before the recorder of that city, and his agent in this country, also a Quaker, made another affirmation proving the handwriting of the plaintiff and recorder, that the plaintiff was a Quaker, and that the person styling himself recorder was such, and had authority to take such an affirmation, and that he was apprehensive the defendant would leave the province, &c.: the court granted an order to hold bail.

Bidwell moved the court for an order to hold the defendant to bail, under the following circumstances. The plaintiff (being a Quaker) made an affirmation of his claim (being for goods sold) before the recorder of the city of New York. The debt was contracted by the defendant and his partner, who is still resident in the United States. Another affirmation was made before a commissioner K.B., in this province, proving the handwriting of the plaintiff and the recorder of New York, that the plaintiff was a Quaker, and that the person signing himself recorder was so at the time the affirmation was made before him, and had authority to take it; that the defendant is in this province, and his partner in the United States; that the agent making this last affirmation, was apprehensive the defendant would leave this province without satisfying the debt, and that the process was not sued for from any vexations or malicious motive. He cited 8 Ea. 364, as establishing a distinction between cases in which the plaintiff could sue out bailable process of right, and those in which it was in the power of the court to grant it on a case disclosed to them.

The court, after taking time to consider, granted the order.

Alfred Barrett and Richard George Beasley, Esquires, were called to the bar, and sworn in, this term.

KING'S BENCH.

HILARY TERM, 3 WILLIAM IV.

Present,—THE HON. CHIEF JUSTICE ROBINSON.
 “ MR. JUSTICE SHERWOOD.
 “ MR. JUSTICE MACAULAY.

FRASER V. BOULTON, ONE, &c.

When all the proceedings against an attorney subsequent to filing the bill had been set aside, and plaintiff afterwards proceeded without serving a copy of the bill anew, the court set aside the subsequent proceedings for irregularity, but without costs, thinking the objection had little merit in it.

A rule was granted in Michaelmas Term, 2 William IV., ordering that all the proceedings subsequent to *filing the bill* in this cause should be set aside for irregularity, with costs,

An affidavit was last term filed on behalf of the defendant, shewing that before Trinity Term last the plaintiff demanded a plea, and in Trinity Term signed judgment, and that before the last assizes he served the plaintiff with notice that a motion would be made in the ensuing term to set aside these proceedings for irregularity; and it was contended, that as the copy of the bill had in the first instance been served consequently to filing the original, another copy ought to have been served before the plaintiff could demand a plea and sign judgment; and also that before proceeding, the plaintiff should have paid the costs occasioned by the former irregularity. The matter stood over, and now,

Per Curiam.—The non-payment of costs is clearly no ground. Paying them is not a condition of the plaintiff's proceeding; and moreover, there is no proof that they were ever taxed and demanded.

As to the main ground, it was probably not intended that the necessity should be imposed of serving a copy of the bill anew; but it is impossible to say that the rule, in the

terms in which it was moved and issued, does not render it necessary, for serving the copy of the bill was certainly a proceeding subsequent to the filing. There is no merit, however, in the objection, and therefore we make the

Rule absolve, but without costs.

MACDONALD V. MONK.

In trespass for driving against the plaintiff's horse, and killing him, the defendant cannot, under the general issue, give in evidence that the accident happened from the plaintiff's negligence or without any fault on the part of the defendant, but such defence must be pleaded.

Trespass, for driving against and killing the plaintiff's horse. Plea, the general issue. At the trial, before Sherwood J., the following facts were proved. That the plaintiff's servant was riding the horse along the highway, and met the defendant, who was driving a horse in a single sleigh in a contrary direction. The shaft of the defendant's sleigh struck the plaintiff's horse in the flank, and killed him on the spot. It was alleged, on the part of the defendant, that the collision took place from inevitable accident, without culpability or negligence on his part, and proceeded from the plaintiff's horse either starting or being mismanaged. The learned judge who tried the cause, charged the jury that the only matter in issue between the parties was, whether the plaintiff's horse was killed by defendant? and that being proved, they should find for the plaintiff. The jury, however, found for defendant; and in Michaelmas term last, the *Solicitor General* obtained a rule *nisi* to set aside this verdict, and grant a new trial without costs; and this day, the court were unanimous that the verdict was wrong; that the general issue only denied the trespass, whereas the defence which was set up here, admitted, but avoided it, and should consequently have been specially pleaded.—1 Camp. Rep. 498; 1 Bing. 213; 8 Moore, 63; 2 Taunt. 314; 1 B. & P. 404; 3 Ea. 593; Hob. 134; 3 Wils. 403; 2 Camp. 378, 500; 2 Bing. 483; 1 Str. 596; 2 Chit. Rep. 639; 2 B. & P. 224; 2 Sal. 637; 2 W. B. 892.

Per Cur.—Rule absolute.

OLIVER V. STEPHENS ET AL.

Where a trial was put off at the assizes on affidavit of the absence of material witnesses, and on payment of costs of the day, and defendant's attorney declined paying those costs himself, the defendant being absent, in consequence of which the trial proceeded, and no defence was made : the court, on affidavits which gave reason to apprehend justice had not been done, and considering the large amount of the verdict, granted a new trial on payment of costs.

This cause was tried before Sherwood, J., at the last assizes for the district of Johnstown, and a verdict was given for the plaintiff for £—. At the trial an application was made to put it off till the next assizes, on account of the unavoidable absence of material witnesses, and the cause was accordingly postponed upon the usual terms of paying the costs of the day. Afterwards the attorney for the defendants refused to pay these costs, alleging that they amounted to a larger sum than he was aware of, or would advance in the absence of his clients, and that he would rather let the cause go to trial than pay these costs.

In Michaelmas Term last, *Bogert* moved on affidavits of the amount of the claim being liable to a considerable reduction by set off, and that the absence of defendants themselves, as well as of their witnesses, both of which were unavoidable, prevented a defence being made, and urged that as this application was made on the terms of paying costs, the plaintiff was not in a worse situation than if those costs had been paid at the assizes when the cause actually was put off.

The court, after hearing *H. Sherwood* for the plaintiff, delayed judgment till this term ; and at this day judgment was given by the CHIEF JUSTICE, and MACAULAY, J., in favor of a new trial, on the grounds that the verdict was for a large sum, and on the matters disclosed by the affidavits there is reason to apprehend that justice has not been done, as in point of fact the defendants have not had an opportunity of laying their case before the court and jury.

SHERWOOD, J., differed. As the defendants had abandoned their application to put off the trial because the amount of the costs exceeded their expectation, they should satisfactorily shew injustice had been done, and he thought that the defendants had not sufficiently shewn that injustice had been

done by the verdict already given, and that they should therefore be left to their right of action to recover the amount of any legal claim which they might have against the plaintiff.

Per Cur.—(Diss. Sherwood, J.) Rule absolute
on payment of costs.

HALL V. BIDWELL.

Where a father took shares in an association (which had been formed to build a steam-boat to be navigated for the joint benefit of the proprietors) in the name of his son, then an infant ; and afterwards, and during the minority of the child, directed two of these shares to be transferred to the defendant, which was done : *Held*, that the infant could not, on obtaining his majority, maintain assumpsit for money had and received, to recover dividends of profit which had accrued on these shares, and had been received by the defendant.

Assumpsit for money had and received. The facts of the case were as follows : An association, or project of an association, had been formed for building a steam-boat, to be navigated for the joint profit of the proprietors or shareholders. The present plaintiff was an infant of about eight or nine years old, when his father, now deceased, took shares in this undertaking in the plaintiff's name to the amount of 100*l.*; that is, he handed to a third person 100*l.* and directed him to take the shares in the name of the plaintiff. For all that appeared in evidence the money belonged to the father, and the subscription was made in the name of the plaintiff without his privity and in his father's presence. Afterwards the father, for some purpose, went to the office when these shares were transferred, and gave up the scrip, (as it was called in evidence) which had been taken in the plaintiff's name, and took out new scrip receipts in the plaintiff's name, one for three shares and another for one share ; and the defendant having a claim on the father under an execution, he (the father) went some time after this to the office, and directed two of the three shares to be transferred to the defendant, or rather he had the subscription cancelled which he had caused to be made in the name of the plaintiff for three shares, and gave np what is called the scrip in his (the plaintiff's) name, and a new scrip was thereupon taken in the name of the defendant for two shares in the boat. Since

the transaction the profits of two or part of two seasons have been divided among the shareholders, and the treasurer has paid to the defendant the dividends accruing upon these shares. The plaintiff sues to recover this money as being the produce of shares legally belonging to him, resting his claim on the principle, that the property in them vested in him by the act of taking stock in his name, which was done by direction of his father ; that the shares being his, no one but himself could transfer them, and that notwithstanding the attempt of the father to change the ownership of them, they are still his, and the monies received on account of them must be regarded as received to his use. At the trial it was expressly left to the jury to say whether the money with which the shares were purchased was the money of the father, and whether the using the name of the son was not merely colourable, and the shares intended to be for the sole use and benefit of the father. The jury found this in the affirmative, and gave a verdict for the defendant.

Draper, in Michaelmas Term last, obtained a rule calling on the defendant to shew cause why the verdict should not be set aside as contrary to law and evidence, and for a misdirection on the part of the learned judge in leaving it to the jury to say what the father's object was in thus using his son's name, for the mere purpose of enabling the father to make a subsequent transfer, or rather to confirm one made by him to a person who must under all the circumstances have known that the stock originally was not taken in the father's name.

Bidwell shewed cause. He contended that this was not a case in which, even if the plaintiff could succeed in establishing a strict legal right, the court would interfere by granting a new trial, as it is very clear the equity and justice of the case are attained by the present verdict. The shares here never could be held to vest in the infant, at least as against creditors, for the father used the name of his child, as the jury have found, colourably, and with a fraudulent intent. If the stock had been taken in the name of a third person, not a child, he would clearly be only the trustee for the real subscriber.—5 B. & C. 501 ; 8 D. & R. 163. And there is no solid reason for any distinction in this cause,

particularly when it appears the plaintiff was involved, and that at the time of the transfer the defendant had an execution against him. But the plaintiff cannot recover against the defendant for the profits of these shares. They are not held upon scrip even belonging to the plaintiff ; that scrip was given up to the company, was received and cancelled by them, and new scrip issued to the defendant, upon which, and not upon anything derived from the plaintiff, he has received these dividends. If anything wrong was done to the plaintiff it was by the proprietors who thus acted ; and the plaintiff may have recourse to them for their shares. There is a want of identity in the property which would also preclude the plaintiff from recovering ; it is true the defendant has received dividends upon shares in this steamboat, but that does not establish the identity of the shares as ever having been those of the plaintiff, and in an action for the profit, he must shew the identity of the thing out of which the profits arise.—Pr. Ch. 535.

But on the ground of the authority of the father as guardian, he might justify the sale of this property, granting it to belong to the infant. If under any possible circumstances he might have such authority to sell, it ought to be presumed here, when the action is brought against a vendor for a valuable consideration. A guardian, in the faithful discharge of his duty, should sell perishable property, moveables which are *bona peritura*.—3 Salk. 177. Discreet and proper management may render it proper to dispose of an investment in that which might turn out to be a losing concern. When then any such case occurs, and it is not to be assumed the contrary was the case here, the guardian may sell and settle the proceeds with the infant. The father here might have retained the proceeds for necessaries furnished to the child.

On another ground the transfer may be also sustained. The father throughout, in the view contended for by the other side, acted as agent for the child ; his act in that character, in subscribing the stock, is recognized by the infant, whose whole claim rests on that foundation. In the case of a third person, and in the absence of contradictory testimony, the court will imply a continuing authority, under which the transfer to the defendant was made. Again, it appeared that this

association of persons was governed by by-laws of their own making ; that the defendant in this cause acquired the shares in question under those by-laws, by which the plaintiff is bound. If, in the transfer they made, they acted erroneously, still the remedy would not be against the defendant, or at least only as one of the association, not as individually liable. Another objection presents itself also, on the plaintiff's own shewing, namely, that he could not have been an original contributor to the building this steamboat, unless he could legally assent and become a party to the agreement entered into by the original contributors generally. It is clear the plaintiff was an infant. He could not enter into a partnership ; for losses might have been sustained, and he could not bind himself to pay his proportion of them. He, therefore, waiving every other objection, never could have a right to demand the profits for which this action is brought although possibly he might recover back the deposit as money lent to the association : and this presents this further difficulty, that the plaintiff's claim rests on his assertion of a co-partnership. He sues for a share of the profits of business transacted, resting his right on the footing of his being a partner. It was shewn at the trial that the defendant was also a partner, holding other shares than those which form, the groundwork of this action.—2 Bing. 170; 1 C. & P. 265. But no action will lie by one partner against another for a share, until a final settlement of all the partnership accounts takes place.

Draper, contra, argued that there was nothing to shew that at the time the father subscribed this stock in the plaintiff's name, he was indebted, or so circumstanced as to make the subscription a fraud upon third persons having claims against him, and that the existence of a claim against him in favour of the defendant, at a subsequent period, could not have the effect of divesting the plaintiff of his right. That although a stranger, whose name was used as the plaintiff's had been, would be in equity held to be the trustee of the person who furnished the money, yet the case was not so with regard to a child ; as a gift thus made is held to be for that child's advancement, unless indeed accompanied with some cotemporaneous declaration that such is not the

father's intention.—1 P. Wms. 60, 607 ; 2 Ver. 120 ; 2 Mad. 116. That it was not therefore properly left to the jury to find what the father meant in what he did, as his meaning was to be taken for the child's benefit, unless at the very time he unequivocally shewed the contrary. That the defendant was clearly proved to have received the profits of the shares which had been originally taken in the plaintiff's name, although, instead of being transferred, the old scrip was taken up and new issued. And the identity is sufficiently established, by shewing that the profits were received on shares, the profits of which, but for the giving up the original scrip, would have been paid to the plaintiff. That the father, although entitled to the care of the person of his child, has no disposing power over his estate. Nor has a guardian any more than a discretionary power as to rents and profits, of which he must, when the ward becomes of age, render an account. That it is not universally true an infant cannot be a partner, the contrary having been held in several cases.—1 Stark. 26 ; 5 B. & A. 157 ; 14 Ea. 210 ; 4 Taunt. 469. That he is entitled to recover in this action against the defendant, although a co-partner, because the money was not received by them generally for the whole co-partnership, but was, by the consent of all the partners, divided and separated from their joint fund, and when so divided was apportioned to the shareholders respectfully. When so apportioned, the defendant received it either as his own or as the plaintiff's, accordingly as the one or other of them is held to be entitled to the shares in respect whereof such apportionment was made.

Cur. adv. vult.

This day the judgment of the court was given as follows : ROBINSON, C. J.—I am of opinion this verdict should not be disturbed. A great deal was said in argument, as to the power of the father over this property (if it be property), which was called stock, supposing it to have been by the subscription legally vested in the son, i. e. the present plaintiff. Upon consideration, it will be seen that such enquiry does not properly arise in this case ; but since it was touched upon, I will merely state that the father, whether he is taken to be guardian by nature or guardian by nurture, has

but the care of the person and education of the child. If guardian by nature, of the person only ; if by nurture, then the care of the person and of the education of the child. He has not, as a general principle, the power of disposing of the child's property ; and if this were stock in the most proper and ordinary sense of the word, as for instance Bank of England stock, and if it had been vested in the name of the infant in the most plain and unquestionable manner, as for instance if it had been bequeathed by some other relation, I have no idea that the father could make a legal transfer of it merely by his own act. The nature of the property called stock, I mean stock held in the funds, is particularly treated of by the court in the case of *Rex. v. Capper et al.*, 5 Price, 262 ; and it appears that whatever qualities may be given to it by positive law, for certain purposes and under certain circumstances, as for instance the subjecting it to execution, it is in general rather a thing in action, not a thing in possession, not included in the idea of goods and chattels, and clearly not capable of being transferred by manual delivery.—5 Price, 262. If, therefore, this were stock of the kind to which I now allude, and clearly vested in the infant, his father could no more transfer it by any act of his than he could indorse a bill or note made to the infant son.

But what is really the case here. A number of persons associate to build a vessel or steamboat, each binding himself to contribute a proportion of the expense, which of course must be a continuing obligation to bear a proportion of all the charges attending the navigation and management of the vessel, and each being from the very nature of the thing to take his chance of the profit or loss attending the same. This is nothing more or less than a special partnership : all are part owners and partners as to this vessel. It is the common case of ship owners. But though an infant may be a partner, he cannot surely be made a partner without his consent or knowledge. There, is to be sure, so far as the other partners are to be considered, a peculiarity in the property in ships, which distinguishes a partnership of that kind from other partnerships ; for certainly the shares held in them can be transferred without the privity of other partners, and the assignee will thus in effect become a partner without

the previous assent of his associates. I speak this of ships such as are within the contemplation of the Registry Acts, not expressing an opinion whether in respect to a vessel upon these lakes this peculiarity in the partnership in ships would apply. It is not necessary to pursue the question, whether it would or not ; because we may assume here that the infant, if by the act done he was made a shareholder at all, was made a shareholder with the assent of the rest, and that afterwards whatever was attempted to be done for the substituting the defendant in his place was equally with the assent of the other shareholders, represented by their agent, a managing owner, or clerk.

In my opinion, the father of the plaintiff had it not in his power to make his son a partner in this concern ; and, I think, what he did in attempting it he could legally undo, so far as the infant is to be considered, of whom it is not proved that he ever knew his name had stood as one of the shareholders in this steamboat, until after the scrip in his name, which had been given to his father, had been given up by him, and the other shares taken in the name of the defendant.

Supposing that the idea of its being a mere colorable transaction, to cover a beneficial interest in the father himself, had received no countenance from the evidence, and had not been submitted to the jury and pronounced upon by them, and supposing that the father had at one time really intended to give his son his share, and had subscribed in his name and paid the amount with that view, I do not see why he could not, so far as the son is concerned, have recalled that act and cancelled the investment he had made of his own money, which, for all that appears, had never been communicated to the son, and was in no manner accepted or sanctioned by him. If the company had been inclined to throw difficulties in his way, and refused to allow the first subscription to be cancelled, and to accept of his own instead of it, that might have called up another question ; but they have agreed to it, and equitably and reasonably enough. All that had been transacted before was between the father and the association, and the son, in my opinion had acquired by their act no indefeasible right that he can find an action upon. If he had, then I should have thought that the father

was incapable of transferring it, and the question that would have presented itself would have been this :—The transfer was made by the association, through their officer, rather than by the plaintiff's father ; that is, they cancelled any shares the plaintiff held, and gave an equal amount to the defendant, the consideration for which was the 100*l.* paid by the plaintiff's father. If a wrong has been done to the plaintiff by this, we must suppose he has a legal remedy against the company ; but still they (the company) have sold the defendant these shares, and the possession of the shares must draw the dividend with them. The company, according to the case in 2 Atkins, 141, can only look on him as the proprietor whose name stands as such in their books ; and while there are no shares in the name of the plaintiff, it might surely be well denied that he can bring an action for money had and received against the defendant, in order to recover from him monies which have been paid by the partnership as the dividend on his the defendant's shares.

That would be decidedly against the principle stated by Wilson, J., in the case of Cunningham and wife v. Laurents, Bac. Abr. 260, 5th Ed., Assump. A. Here the defendant claims, and, for all that appears, equitably claims the interest in these shares ; and that being so, his title to them cannot be decided in an action against the actual holder for money had and received, being the produce of those shares, any more than the owner of an estate can bring an action for rents received against a person who disputes his title ; or than the owner of a horse could bring the same action against a person who has him in possession, claiming property, to recover the money which the horse has earned.

Independently, however, of these difficulties, the jury have found, and I doubt not rightly, that the shares were first taken in fact for the father, though the name of his infant son was used as a cover, and that the beneficial interest in the shares was in fact his ; and this being so, there is certainly no equity on which to found the remedy for money had and received.

SHERWOOD, J.—I cannot say I entirely coincide with the Chief Justice, in all the legal principles which he has advanced ; but I concur with him in the opinion that a new

trial should not be granted in this case, for the following reason : it was left with the jury to decide whether Captain Hall intended the stock should belong to himself or to his son, when he bought it, and they found he intended it for himself. I consider this finding of the jury conclusive against the present application for a new trial.

MACAULAY, J.—That the property in the shares vested in the plaintiff, either beneficially or as a trustee, seems to follow from this consideration, that his name was not used fictitiously. Before the purchase, the property remained in other persons ; afterwards, those persons, on delivery of the scrip, became divested, and they adopted no act but completing the sale by the scrip, to divest themselves and when they became divested some one else became invested. It could not be plaintiff's father, unless plaintiff's name was a mere fiction, and even then quere, unless the fictitious name was on both sides meant to designate the father. If not plaintiff's father, it must have been plaintiff, because thence-forward the stock or shares were treated as having been sold and vested in another. The act of sale was only so far inchoate that plaintiff might have dissented from it ; it did not repose in the breasts of the original vendors to rescind or repudiate it, and if not, neither could the father. The contract was between the co-owners and plaintiff. The scrip was delivered to the father on behalf of the latter, not as having the controul until delivered over. The vendors were not apprized of and contemplated no trust, though they so recognized the transaction ultimately. The father was not assigning a thing of his own in possession, but merely advancing to these persons the money, as a consideration for their assigning their property to a third person, either as an independent owner or trustee. The evidence shews unequivocally no design to advance the child, but rather that he was introduced as a trustee to cloak ulterior views. It seems he was a trustee, and had he gained actual possession of the property he might at law maintain it, in spite of his *cestuique* trust but, however, a resort to equity might be essential as between the trustee and the *cestuique* trust. I do not think, inasmuch as the father's disposition has been carried into effect, possession given, &c., a court of law

should grant a new trial, because perhaps the *cestuique* trust could not at law dispose of the stock. In equity, he would be regarded as the owner and his acts be upheld.—*Poph.* 70; *Dyer*, 369; 1 H. B. 446; 10 Ves. jr. 544; 1 T. R. 622, 735; *Willis on Trustees*, 201.

Per Cur.—Rule discharged.

YATES V. CARNEY AND GRISWOLD.

Action against two defendants. After issue joined, and after four terms had elapsed, but within a year, one of the defendants having been arrested, put in special bail, and gave a cognovit retracting his plea. The plaintiff proceeded against the other. *Held*, that the other defendant was entitled to a term's notice.

Trespass against two. One of them was arrested under a judge's order, and gave bail on 8th July, 1831. Issue was joined on pleas jointly pleaded by the defendants, in August, 1831. The other defendant was arrested and put in bail, and gave a confession of judgment, and retracted his plea, in July, 1832. Four terms had elapsed from the filing the replication (but not a year) before the plaintiff gave notice of trial to the other defendant, which was done for the last assizes for the Johnstown district, when the plaintiff obtained a verdict, no defence being made. In Michaelmas term, *Draper* obtained a rule nisi to set aside this verdict, on the ground that a term's notice was necessary before the plaintiff could proceed in the cause.

H. Sherwood shewed cause, contending that in a joint action, when defendants had not severed in their defence, any step taken by one operated as a step by both, and that the putting in special bail by one defendant waived the right of both to a term's notice.

The court differed in opinion. The case stood over till this term.

The CHIEF JUSTICE and MACAULAY, J., thought that the proceeding by the one defendant, which abandoned the defence as to him altogether, did not supersede the necessity of a term's notice as to the other, who, denying the plaintiff's right of action, might complain of a surprise, after the plaintiff had laid by four terms as to him.—3 *Ea.* 1; 4 *T. R.* 520; 6 *Mod.* 18, 57, 146; 2 *B. & A.* 594; 3 *M. & S.* 500; 1 *Chit. Rep.* 317, 667.

SHERWOOD, J., differed. The only point to be determined is, whether a term's notice was indispensable. In the case of Bland v. Darley, 3 T. R. 530, Mr. Justice Buller said, "The rule was established for the purpose of preventing surprise on the defendant, after the plaintiff had lain by four terms without proceeding in his action." Now it appears to me, the defendant, Griswold, would not have been surprised by the proceeding of the plaintiff, because he must have entered special bail in the cause but a few weeks before the notice of trial was given, which proves he expected the suit to go on; and if he were the only defendant, I should say there were no grounds for the present application. This is a joint action against two defendants, and it becomes necessary to examine how far that circumstance makes a difference in the principle of the case. By analogy with other proceedings in joint actions, I am inclined to think the filing of special bail by one defendant had the same effect as regards the other as if he had filed such bail himself, because both defendants jointly pleaded the same pleas by one attorney. By stat. 14 Geo. II. c. 17, sec. 4, if the defendant reside above forty miles from London, fourteen days' notice of trial must be given; but if he resides within that distance, eight days' notice is sufficient. Now it has been determined by the Court of King's Bench, that if there are several defendants, and all reside above forty miles from London, except one, that only eight days' notice of trial need be given.—4 T. R. 520. In trespass against several defendants, if they join in pleading, as they did in this case, if the jury on the trial find all of them jointly guilty they must assess damages against all alike, although some of them may be less blameable than others.—*Cro. Eliz. 260; 2 Str. 910; 6 T. R. 199.* In the present case, it was proved that one of the defendants took the oxen out of the plaintiff's stable and delivered them to the other defendant, who drove them away. Both went to the plaintiff's house together, and both joined in the trespass, and the verdict therefore was properly given against both.

I incline to think, under all the circumstances, that a term's notice was not necessary; and I more willingly come into that opinion, as the defendants have neither sworn to

merits, nor attempted to shew the verdict to be unjust on any ground.

Per Cur.—Rule absolute.

SHERWOOD, J.,*dissentiente.*

DOE EX DEM. HUMBERSTONE V. THOMAS.

In ejectment, if the lessor of the plaintiff claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father.

Ejectment for lands in the district of Johnstown, which the lessor of the plaintiff claimed, as the only son and heir at law of the late Samuel Humberstone, deceased. To prove his pedigree, several letters from Samuel Humberstone, to the lessor of the plaintiff, were produced and filed, in all of which he was addressed by the appellation of "Dear Son," at the commencement, and acknowledged as such at the close by the terms of "Your affectionate Father." It was proved that Samuel Humberstone frequently said the lessor of the plaintiff was his son, and that he lived in the family in that character. It was further proved that the eldest son of the lessor of the plaintiff was received in the family of Samuel Humberstone as his grandson. It appeared, by the statements of Samuel Humberstone, that he had been twice married; that his first wife died at New York; but he never said she was the mother of the lessor, or that she was not. It was admitted that Mary Humberstone, the second wife, was not his mother. No further evidence was given to legitimate the birth of the lessor of the plaintiff, and none to shew who his mother was. On the part of the defendant, it was proved that Samuel Humberstone frequently said the lessor of the plaintiff was not his son, and said so at one time when he was dangerously ill. He told one witness that the lessor of the plaintiff was the son of a widow woman in New York, and that his father was a sea-faring man. The defendant at the same time claimed to be the owner of the premises by purchase, and adduced the following evidence: The will of Samuel Humberstone, attested by three witnesses, containing the following clause: "I give and devise to my "beloved wife, Mary Humberstone, the house and premises "that I now possess, and whereon I now reside, with all and "singular my other remaining property, both personal and

"real, to be hers during her natural life, to be at her full
"and free disposal to whom and whosoever she pleases ;
"out of which it is my will that my just debts shall be paid." Also a deed of bargain and sale from Mary Humberstone to the defendant, which had been duly registered. Sherwood, J., who tried the cause, charged the jury that it was incumbent on the lessor of the plaintiff to prove himself the heir of Samuel Humberstone. This could not be done without shewing who was his mother, and her marriage with his alleged father, from whom he claimed. There was no intimation on the part of the lessor of the plaintiff of the maiden name of his mother, and no account whatever of her family, and therefore the learned judge considered the relationship between him and Samuel Humberstone not sufficiently established. With respect to the will, the learned judge charged that his impression was, that it did not confer an estate in fee simple on Mary Humberstone, but only an estate for life. The jury found in favour of the lessor of the plaintiff, and in Michaelmas term last—

H. Sherwood obtained a rule nisi for a new trial, on the following grounds :

1st. That the verdict was contrary to law and evidence.

2ndly. For misdirection as regards the will, which gives a fee simple.

Bogert shewed cause. In England, the cases show that the declarations of deceased members are evidence to prove pedigree; and the declarations of a father are surely evidence to go to a jury to establish the relationship of father and son. A greater latitude, rather than a less, should be given in this country, where people come from every part of the world, and where it must be in many cases impossible to give any other evidence on this head. On this principle, the case of *Doe ex dem. Magher v. Chisholm*, 1 U.C. Rep., was decided in this court. The weight of evidence, although some species of contradictory testimony was adduced by the defendant, was in favor of the lessor of the plaintiff, and so the jury have found it. Until shortly before the death of Samuel Humberstone, there was no question of it, and it was doubtful at the trial whether the expressions on which the defendant relied were not extorted from Samuel Humberstone when he was in

a state of great weakness, and scarcely knew what he said. Legitimacy is always to be presumed until something is shewn to impeach it. The verdict here goes to establish it, after the jury had considered all the conflicting evidence. As to the second point, *Bogert* contended that the introduction of the words "for her natural life," were conclusive as to the intention of the testator, and that an estate in fee simple could not be raised by implication against the express words of the will.

H. Sherwood contra. The evidence which was left to the jury was not *legal* evidence to establish a pedigree, and their finding, therefore, has no weight in the decision of the question. He should have proved a marriage, either by actual proof or by reputation; that they were man and wife, or that they cohabited as such. The mere declaration of a father, "this is my son," is not enough. It is too remote. If it was not necessary to prove a marriage, still the evidence on the whole went to shew that the lessor of the plaintiff was illegitimate; for the mode of address, "my dear son," only tended to shew the character of father and son existing, while the other statements of Samuel Humberstone, consistent with the previous title of son, tended to shew he was not a son by marriage. An heir at law must remove every presumption of there being any title better than his own, or any intermediate claim.—15 E. 294. On the second point, he urged, that the words used in this will, "to be at her full and free disposal," &c., carried a fee simple according to the good sense of many cases.—1 Inst. 96; 1 Roll. Abr. 832; 3 Leon. 71; 2 Lev. 104; 3 Anst. 783; 1 Mod. 189; 1 P.W. 148; 10 Mod. 31. For unless they give a power to sell the fee, they are utterly useless; for the wife could sell her life estate without them. And, moreover, it has been repeatedly held, that as the lands are charged with the payment of debts, they will also carry a fee.

The CHIEF JUSTICE having, when at the bar, been consulted upon this title, declined giving any opinion.

SHERWOOD, J.—With respect to the first point, I am still of the same opinion I was at the trial. I think the same deduction of descent as was formerly necessary to be pleaded in real actions, must now be given in evidence in ejectment,

in order to make out a title by descent. Some account of the mother, and some evidence of her marriage, as well as the identity of the lessor of the plaintiff, should have been adduced.—2 W. Bl. 1099; 2 Ph. Ev. 233; 4 Star. Ev. 1100. The evidence which was given was altogether too loose to prove a pedigree (*a*). On the second point, I incline to think I was mistaken. Some of the authorities cited appear to establish the position that the devise to Mary Humberstone conveyed an estate in fee; but as it does not seem indispensably necessary to form a decisive opinion on that point in order to dispose of the present application, I would prefer taking more time. I think most of the cases on the subject are to be found in *Chance on Powers*, 45-52 (*b*).

I am quite clear a new trial should be granted on the first ground, namely, that the verdict is against law and evidence, and I think without costs.

MACAULAY, J., concurred in thinking the evidence in proof of heirship was insufficient, and that the will imparted to the wife at least a *power* to dispose of the fee, which she had done. And *debts* being directed to be thereout paid, would remove all questions, did any doubt exist; and that provision in the will went far to shew, that the wife took a fee simple, and not a mere *power* of alienation.—10 Ea. 437; 10 Ves. 370; 2 Wils. 6; Comyn. 194; Cro. Jas. 199; Cro. El. 68; Beulor, 180; Latch. 9. 39. 134; W. Jon. 137; Noy. 80; Kelynge, 6.

Per Cur.—Rule absolute without costs.

JONES & JONES v. WING.

Where two plaintiffs, one of whom is sole judge of the district court of the district in which the defendant resided, sued in King's Bench on a cause of action within the district court jurisdiction: *Held*, that they were entitled to full costs.

Assumpsit for goods sold and delivered. Defendant suffered interlocutory judgment, and a jury assessed the damages at 8*l.* 9*s.* 8*d.* An application was made at the assizes for a certificate to entitle the plaintiff to tax King's

(*a*) 10 Ea. 120; 8 Ea. 452; 7 Ea. 290; 11 Ea. 504; 4 Camp. 401, 417; 13 Ves. Jr. 514, 548; Bull. N. P., 233, 232; T. Raym. 84; 4 B. & A. 53; 6 T. R. 330; 3 T. R. 707; 7 T. R. 3 n.; 1 R. & M. 297; 2 Bing. 86; 9 Moore, 183.

(*b*) 1 Leon. 156, 283; Barnes, 11; T. Jo. 161; 3 Leon. 71; 4 Leon. 41; 6 Mod. 111; Styles, 258, 275, 315; 1 Freem. 164.

Bench costs, on the ground, that one of them is sole judge of the district court of the district in which the defendant resides, and that there is no other judge but him in that district. Sherwood, J., before whom the damages were assessed, doubted whether he could certify, as this case did not seem to come within the words of the statute, 58 Geo. III., ch. 4, and a motion was made to direct the master to tax full costs, pursuant to the 9th rule of this court.

ROBINSON, C. J.—I think clearly plaintiffs should have King's Bench costs, for the cause of a judge of a court is not fit to be tried in that court, since by law it cannot; and surely the legislature cannot be supposed to have intended anything so unjust as that a plaintiff should lose his demand, or be confined, at the peril of paying costs, to a court in which he cannot sue. The evident object of the act was to confine suits to the district court that can be brought in that court.

It may be said that the government might have appointed another judge in addition to the court, and then plaintiffs could have sued in it. Neither the plaintiffs nor we can control the government in this respect. I think we can only look at the facts as they are. I see no cases on the Court of Conscience Acts that can bear on this case, unless those in the margin.—8 T. R. 235; 6 T. R. 175.

SHERWOOD, J. (after stating the case).—My brothers are of opinion that the reason alleged is sufficient to entitle the plaintiffs to a certificate, and that this court should grant it under the 9th rule, which the court has made to regulate its practice; and although I do not fully coincide with them in that opinion, it becomes unnecessary to state my objections, as there is another obstacle to the granting of the certificate which appears to me insurmountable.

I am of opinion that the judge of assize has no authority, under the stat. 58 Geo. III., to grant the certificate, unless there has been a trial of the cause before him. I also incline to think, that no other court can legally grant a certificate under that act. The words of the enactment are, "That in any suit hereafter be brought in the court of King's Bench, which suit may be of the proper competence of the District Court, no more costs shall be taxed against the defendant than would have been incurred in the District Court in

"the same action, unless the judge who tried the cause of such suit or action shall certify in open court at the trial, that it was a fit cause to be withdrawn from the District Court and commenced in the Court of Queen's Bench." The word "Trial" used in the act, in my opinion, means, the examination of the matter of fact in issue between the parties; and if no issue is joined between the parties, there can be no trial. The interlocutary judgment in this case established the plaintiff's right or title to damages, and the assessment of them afterwards by the jury, was merely a proceeding to inform the conscience of the court who may if they please assess the damages themselves, with the plaintiff's assent, and thereupon give final judgment.—3 Wils. 61, 372; 2 Saund. 105; 4 Taunt. 148. It certainly is not the practice of the court to order their officer to assess damages, even with the assent of the plaintiff, except in cases where the damages are merely the subject of calculation, as upon promissory notes, bills of exchange, or other analogous matter. I think the mode of proceeding to assess damages at the assizes after judgment by default in this province, is a substitute for the English writ of enquiry, and is governed in all respects by the same law, and cannot properly be called a trial, any more than the proceeding before the sheriff in England on a writ of enquiry. By the statute of Gloucester, 6 Ed. I. cap. 1, the plaintiff is entitled to costs of suit in all actions in which he recovers damages. To this general rule, however, there are several exceptions, by subsequent statutes in England, restrictive of the plaintiff's right to costs, unless the judge before whom the cause is tried grant a certificate to authorize the officer to tax full costs. It appears by Buller's *Nisi Prius*, 329, that the plaintiff is entitled to full costs upon a writ of enquiry after judgment by default in all cases; and I therefore consider the plaintiffs in this cause are entitled to full costs, although it clearly appears the cause of action was within the proper competence of the District Court. My present opinion is, that this court has no authority or discretionary power to restrict the officer in his taxation of costs in this case, or in any other in which damages are assessed by a jury after judgment by default.

MACAULAY, J., concurred with the Chief Justice in thinking full costs should be allowed.

Per Cur.—Let the master tax King's Bench costs.

HALL v. COLEMAN.

Where A. & B. exchanged horses, each taking the other's, and B. gave A. a promissory note for a difference of value in the exchange—A. sold the horse he got from B. almost immediately—and after a lapse of two years, during which nothing appears to have been done by either party, B. is sued upon his note by A.—*Held*, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault or blemish at the time of sale.

Assumpsit on a promissory note.

At the trial at the last assizes for the ——— District, *coram* Sherwood, J., the facts of the case appeared as follows:

The note was given by defendant to plaintiff, for the difference in value of two horses, belonging to the parties respectively, and exchanged by them. This supposed difference was the only consideration for the note. The plaintiff is an American citizen, and came from the State of New York with his horse into the Bathurst District, where he met defendant, and where the exchange was made.—Immediately after the exchange the plaintiff sold the horse he got from the defendant, and returned to the States. At the time of exchanging horses and giving the note, the plaintiff declared his horse was sound and free from blemish. Evidence was adduced on the part of the defendant, that the horse was not only lame, but that the plaintiff well knew he was lame when he alleged he was perfectly sound ; and that the defendant's horse was in fact worth as much as the plaintiff's.

Sherwood, J., charged the jury that if they were convinced by the testimony the plaintiff had intentionally misrepresented the condition of his horse to the defendant at the time of the exchange, and that in truth the defendant's horse was then worth as much as plaintiff's, they should find a verdict for the defendant on the grounds just stated. The evidence went to shew that the lameness of the horse could not be readily discovered, as it was not apparent when the horse was heated by exercise and travelling on level ground, but only when descending a hill, or when he became cool for some time after being used.

In Michaelmas Term, *H. Sherwood* obtained a rule *nisi* for a new trial, on the grounds of misdirection, and that the verdict was against law. He contended that, as the defendant had kept the horse he got from plaintiff, had never repudiated the contract in any way, nor given the plaintiff any notice, he could not now set up any defence.

James Boulton shewed cause, and contended that, as the plaintiff had sold the horse he got from the defendant immediately on the exchange being effected, he by this act rendered it impossible for the contract to be wholly repudiated : for the defendant could not have obtained his own horse back again, and he would not be doing anything more than an idle ceremony in tendering the plaintiff his back and demanding a redelivery of his own. Under the circumstances, he could only wait till an attempt was made to collect the note, and shew for the defence the total failure of consideration for it.

H. Sherwood contended there was no evidence of fraud, or at least none which should have been received. This defence, set up without notice, was a complete surprise upon the plaintiff. It should be also remembered that it was proved at the trial that the horse the defendant got from the plaintiff was a stallion ; and the warranty of soundness may be considered as a qualified warranty, as the particular purpose for which such an animal is usually bought. So that the case of fraud is very weakly sustained. Again : the consideration of a promissory note must fail entirely, or not all. Unless the whole contract was promptly repudiated by the defendant, he could not set up this defence. He could not keep the plaintiff's horse and refuse also to pay the note. The ground for refusing payment must be a fraud practised in the exchange. As soon as the unsoundness was discovered, the defendant should have given notice, or tendered the horse back to the plaintiff, and so repudiated the contract. The plaintiff selling his horse made no difference in what the defendant ought to have done ; but while the defendant kept and still keeps the plaintiff's horse, he is bound to pay the note and fulfil the contract, which is entire.—2 *Taunt.* 2 ; 3 *Stark.* 175.

Judgment was this day given as follows :

ROBINSON, C. J.—The only doubt can be, as plaintiff soon after the sale sold his horse, and the contract could not be wholly rescinded and parties placed *in statu quo*, was a tender back or notice of the unsoundness necessary notwithstanding? I think, on the authority of many cases, the defence is not legal.—7 Ea. 274, 481; 1 T. R. 134; Cowp. 818.

SHERWOOD, J. (after stating the case).—The plaintiff's counsel contends that, as the defendant kept possession of the horse and never offered to return it after he discovered the lameness, he could not set up fraud and want of consideration as a defence in this action, his only remedy being a cross action for the deceit, if there was any, and the cases of Lewis v. Cosgrave, 2 Taunt. 2, and Archer v. Bamford, 3 Star. 175, were cited as sustaining the position. In the case of Hunt v. Silk, 5 Ea. 449, Lord Ellenborough gives the law in these words, on the subject of rescinding contracts: “when a contract is to be rescinded at all, it must be rescinded in toto, and the parties put *in statu quo*.” In the present case, the plaintiff himself put it out of the power of the defendant to rescind the contract, by immediately selling and delivering over the horse which he received from the defendant to a stranger. If the plaintiff had been a resident in the province, and the defendant might have found him, what possible advantage could he have derived from an offer to return the horse. The rescinding of the contract of exchange had become impossible, by the act of the plaintiff; and therefore the facts of the case differ materially, in my opinion from those in the case of Lewis v. Cosgrave. In that case the contract could have been rescinded; both parties had it in their power to do so; and the defendant actually offered to rescind the contract, but the plaintiff refused. The fraud practised in that case, as in the present, gave the defendant the option of abrogating the contract made between the parties; but here the defendant could not exercise that right, in consequence of the impossibility of placing the parties where they first stood: and the plaintiff was alone instrumental in bringing about such a state of things, and of which I think he should not be allowed to take advantage for the support of his own fraudulent act. The present case

differs also in principle from *Archer v. Bamford*. The facts there shewed that a bill of exchange, indorsed to a third person, had been accepted by the defendant, and the action was brought against the acceptor by the indorsee ; and the defendant at the trial wished to give in evidence, on the general issue, that the bill was drawn for a consideration much less valuable than the defendant had reason to suppose, in consequence of the false representations of the drawer—to which transaction the plaintiff had been privy. It could not be established, however, that the consideration had wholly failed, the defendant having kept possession of part of the property sold to him by the drawer, without having offered to rescind the contract. Abbott, C. J., said “that ‘inasmuch as the defendant had not repudiated the contract, ‘but had retained possession of part of the premises, and as ‘consequently the consideration had not wholly failed, it ‘seems impossible to say the bill was utterly void.’” The doctrine established by these cases, and others of the same class, seems to be this, that when a person buys an article and gives a negotiable instrument in payment of the price agreed upon between the parties, such an instrument shall not be avoided by fraud in the previous contract of sale, unless the consideration of the instrument has wholly failed. If the seller make false representations at the sale, and the buyer, upon discovering the fraud, offer to return the article, which is refused by the other, such offer shall have the effect of an actual rescinding of the contract of sale by consent of the parties ; and the negotiable instrument, given for the whole price, or any part of it, to a person privy to the fraud, becomes inoperative in law for want of consideration. In the absence of fraud, the absence of consideration is no defence for the acceptor of a bill or drawer of a promissory note, when sued by the indorsee ; nor would fraud itself be a defence in such an action, if the consideration of a bill or note did not utterly fail. As if a negotiable bill or note is given for the price of an unsound horse, fraudulently sold as a sound horse, together with some additional consideration in itself good, the whole amount of the bill or note might be collected in a suit at law. The promise to pay, expressed in the bill or note, is entire, and cannot be partially avoided ;

if it be valid in part, it is good for the whole. Evidence of a failure of consideration for less than the whole could not be admitted, I conceive, in such a case. The law, however, appears to be different where no negotiable bill or note is given for the stipulated price of the article or property sold. The case of Gillis v. Cormack, cited in 7 Ea. 481, and the case of King v. Boston, referred to in a note on the same page, go to shew that if the seller warrant the article to be of a certain description and quality, or if the seller of a horse warrant him sound, when he is not sound, and afterwards bring an action to recover the amount of the stipulated price, the defendant, under the general issue, may shew the extent of the warranty, and that the article is worth less than the price agreed upon, or that in fact it is worth nothing at all. This may be contrary to the spirit of former decisions, but still it appears to be right, because such a defence can be no surprise upon a person who has made a warranty, and with which it is but reasonable to hold him acquainted ; and litigation is much shortened when the whole matter is settled in one suit, instead of driving the defendant to his cross action upon the warranty. In a more recent case (Germaine v. Burton, 3 Stark. 32), the goods were sold at a stated price by sample, and the question was, whether the defendant was compelled to pay the full price, or might prove in diminution of damages that the goods did not correspond with the sample, but were of an inferior quality. It was ruled by Bailey, J., that the plaintiff was not entitled to recover more than the value of the goods, and upon the principle, as I conceive, that a sale by sample is considered as a sale by warranty, according to the case of Parker v. Palmer, 4 B. & A. 387, in which the same judge gave his opinion. A purchaser may keep the goods bought, and still bring an action on the warranty ; but if the vendor first bring his action for the stipulated price, it is altogether more convenient and equally just, as I said before, to allow the vendor to prove the inferiority of the article, in diminution of damages, than to compel him to pay the whole stated price, and drive him to his remedy in another action ; and more especially when the vendor, by his own act, deprives the vendee of the power of rescinding the original contract of

sale.—1 W. Bl. 17; 2 T. R. 745; 6 Taunt. 446. I am aware the case of Hopkins v. Appleby shews a rule of Lord Ellenborough apparently different from the one before cited (1 Stark. 477; 3 Stark. 32); but the facts of that case were entirely different from the other. In Hopkins v. Appleby, the defendant from time to time used the article he bought till it was entirely consumed, without giving the plaintiff any notice of its inferiority.

It appears to me, the two foregoing classes of cases shew, that where a negotiable bill or note is given for the stipulated price of an article, it may be collected, unless fraud in the holder and a total want of consideration for the bill or note be established; but when no bill or note is given for such price, the inferiority of the article may be shewn in mitigation of damages, or its utter want of value, as a sufficient defence in any action brought by the vendor to recover the price agreed upon at the time of the sale, provided there was an express warranty of the quality of the article. Suppose a person should contract to sell twenty barrels of salt, and warrant it of the first quality, and upon delivery of that number of barrels he should take a note for the stated price, and that it should afterwards appear that all the barrels were filled by the vendor with sand, would he be allowed to recover the amount of the price, by bringing his action upon the note against the vendee? I think he would not. Fraud and a total failure of consideration would prevent him. If a part of the number of barrels were filled with salt of the first quality, he might recover the full amount of his note; and the remedy of the vendee would be a cross action. The present case, I think, is governed by the same principle. Evidence was given to establish fraud as well as the want of consideration. The substance of it was, that the plaintiff and defendant exchanged horses. The plaintiff warranted his horse sound and free from fault and blemish, and asserted he was more valuable than the other. The defendant agreed to the proposition, and gave his note for the supposed difference in the value of the two animals. It afterwards turned out that the horse was lame at the time of the exchange, that the plaintiff knew he was lame, and that in consequence of the lameness he was not worth more than the other horse.

It further appeared that the plaintiff sold the horse he got of the defendant, immediately after the exchange took place, and thereby prevented the rescinding of the contract of exchange. In the case of *Archer v. Bamford*, 3 Stark. 175, the defendant kept possession of the property which he bought, and gave a negotiable instrument to secure the payment of the price. After he found he had been imposed upon, there was nothing to prevent his repudiating the contract of sale, but he still kept possession, which was considered presumptive evidence of his adoption of the validity of the sale, and of some consideration for the bill of exchange upon which he was sued. In the present case, no such presumption arises. The keeping possession cannot be viewed in that light, because the plaintiff, by selling the other horse, rendered the rescission of the contract of exchange impracticable, in my view of the matter, and therefore the keeping possession under such circumstances raises no presumption of acquiescence in the defendant. I consider the note upon which this action is brought as a distinct contract from the exchange, and for which the supposed difference in the value of the two horses was the only consideration. There was in truth no difference. The plaintiff, by the false representation of the soundness of his horse, induced the defendant to execute the note under an erroneous impression of the condition of the horse at the time. It appears to me, the jury must have found both fraud and a total want of consideration in this case, the union of which I think all the cases allow is a valid defence against the party implicated, even if the action be brought on a negotiable instrument, as in this case. I am therefore of opinion the verdict should stand.

MACAULAY, J.—The authorities draw a distinction between cases of fraud, and those in which it may be in the election of the buyer to rescind the contract. If this were a clear case of fraud, the defendant might avail himself of the defence under the authority of *Lewis v. Cosgreave*, 2 Taunt. 2; 1 Stark. 51; but then it would be an indispensable preliminary to such a defence, that he had promptly repudiated the contract, and restored or tendered back the

horse—a step that does not appear to have been taken. The defence of *fraud* cannot therefore be set up : independent of the consideration that the defendant appears to have relied on the warranty, on which, and not on the alleged fraud, the defence was rested. If, by reason of the plaintiff's immediate departure and continued absence from the province, the defendant could not conveniently give personal notice, or tender back the horse, &c., he should have sent a written notice by mail, if he knew the plaintiff's residence, and if not he should at least have made diligent inquiry where he was to be found, and have been prepared to prove the same at the trial.—3 Stark 175 : Chit. Bills, 72, 412 ; Bayley, Bills, 236. But there is no proof of fraud. An action of deceit will often lie where one party practises upon another, in sales of this kind, even where there is no warranty ; but then the defects must be latent, known to the vendor, and concealed from the vendee.—Chit. on Con. 136, 223 ; Cro. Jac. 4, 389 ; 4 Taunt. 779, 786 ; 2 Bing. 183 ; 10 Ves. jr. 507 ; 1 Salk. 211 ; 2 Rol. 5 ; H. Bl. 17 ; Cowp. 81 ; 7 Ea. 274 ; 1 M. & M. 483. The defect in this case was not susceptible of concealment, had the defendant used reasonable precautions and exercised ordinary circumspection. The lameness was a defect capable of ready detection ; and if the defendant did not deem it worth while to move the horse, or relinquished such desire in deference to the excuses of the plaintiff, or in reliance upon his bare assertion, though false, I do not think he can now complain of deceit. It is his own credulity and indiscretion that he should blame. At all events he cannot, under such circumstances, complain of any deceit or fraud, vitiating the note, without having attempted to rescind or repudiate the contract, which remained still open at the trial, if the defendant had power to rescind it. If the lameness was partial, as when descending hills, &c., then, as proceeding from founder or other latent cause, it would not* constitute fraud vitiating the contract, but a breach of warranty. It does not follow that every defect or unsoundness constitutes fraud, if known to the vendor, espe-

* 5th December, 1833, held "if unknown to the vendor."

cially when the vendee relies on a warranty. I concur with his Lordship the Chief Justice, that there should be a new trial.

Per. Cur.—Rule absolute.

SHERWOOD, J., *dissentiente.*

FORRESTER V. SPENCER.

A., having been arrested at the suit of a third person, placed a mare in B.'s possession, on an agreement that B. should go, and if the party arresting proved a demand against A., by his own oath or by that of others, B. was to pay it and to keep the mare till repaid. B. did pay 10/., but without shewing he did so in consequence of its being sworn to ; and the mare remaining with him, he used her once in the plough. A. thereupon, without demand, brought trover, alleging this use of the mare was a conversion, and obtained a verdict. The court granted a new trial without costs.

Trover for a mare. One Rice had caused the plaintiff to be arrested for a small sum, by a warrant of detention issued by a magistrate, under the authority of the provincial act lately expired. The defendant, as constable, executed the warrant. He received the mare from the plaintiff, as security for his appearance at a subsequent day, and for surrendering himself to the constable in case Rice should proceed by taking out a writ of *capias ad respondendum*. The plaintiff accordingly went to the defendant, eight days after the arrest ; but as Rice had taken no further proceedings, he demanded his mare from the defendant, who refused to give her up, alleging that the plaintiff promised to come to him the Monday following the arrest, but failed to do so. After some altercation, the parties made a fresh arrangement. The plaintiff left the mare with the defendant, with directions to go and settle with Rice, and pay him what he could prove, or what he would swear to, and then keep the mare in security for what he should pay ; and that he, the plaintiff, would repay the money to the defendant in the course of ten days or a fortnight, and take the mare away. The defendant kept the mare on these terms, and shortly afterwards went and paid Rice two dollars, which Rice claimed as due by the plaintiff to him, but which the plaintiff denied owing. It did not appear that Rice ever proved the debt by his own oath or by the oath of any another person whatever ; but by all that did appear, the defendant paid the two dollars without any proof of its being due by the plaintiff. It did

not appear that the defendant ever used the mare before he paid the two dollars to Rice, but it was proved that he used her generally afterwards, and ploughed with her in his fields. Several months elapsed, after the mare was left with the defendant, before the action was brought. No demand of the mare was made by the plaintiff after the second bailment. The jury at the trial found for the plaintiff ; and in Michaelmas term last, Baldwin obtained a rule nisi to set aside the verdict and grant a new trial, on the ground that the verdict was against law.

H. Sherwood shewed cause. The sole question in this cause is, was there sufficient evidence of a conversion given ? It is admitted there was no demand ; and it is also admitted the mare was used by the defendant. Now, until he had paid money, the right to hold her as a pledge, a security for repayment, did not accrue ; and as a consequence, the right of using a pledge moderately did not arise. Then this payment must be proved, and it must be shewn to be a payment intended and contemplated by the agreement ; that is, he must shew that such evidence of an existing debt as the agreement contemplated was adduced, upon which he did pay the money. But without this he ought not to use the mare, for he may sue for the keeping of her. His right is to charge for this keep, not to use the animal as a recompence for it. The general use of an animal is certainly worth something more than its keep ; and if he always used the animal, though not to injure it, he would be making a profit out of that of which he was a mere bailer.

Baldwin in reply. It is clearly established, that when a bailment is made, which from its very nature must occasion an outlay, the bailee may use it moderately to meet or pay for such outlay, and the mode of its use is in the ordinary course of working in the country. Nor can it be said that the use, as to the duration of it, was immoderate, for they only proved he ploughed with her once. The case would have rested upon different principles, if a demand and refusal had been proved. The defendant would have been driven to rely on the payment made by him, and consequently to shew that he made it according to his agreement with the plaintiff. But now the question is, whether the plaintiff,

having put his mare into defendant's possession, and left her there during the whole winter, during which time defendant kept her, and of course at some expense, can treat the defendant's having once used her to plough in the spring as a conversion, and compel him to pay the value of the animal in this action of trover.—Cited 5 M. & S. 180; 2 Salk. 522.

The case was not decided till this day.

ROBINSON, C. J. (after stating the case.)—It seems to be clearly settled, that the pawnee may use moderately a horse pawned to him, in recompense for his meat (*Coggs v. Bernard*, 2 Lord Ray, 917); and that, in my opinion, decides the present case, for the reason equally applies. If a pawnee of a horse were to remit money to the pawnee, and pay his debt, but neglect to call for his horse, leaving him to the pawnee to keep, it may be that the bailment would be at an end by paying the debt, but there could be no reason why the pawnee should not continue to use the horse, if he continued to keep him for no other reason than that the pawnee did not come and demand him. It may be granted, that the only debt the defendant paid was one he ought not to have paid, according to the agreement. The only consequence of that, I think, would be, that the plaintiff could demand his horse without reimbursing to the defendant the sum he had imprudently advanced. It would be no otherwise than if defendant, on inquiry, had found no debt due, and had paid nothing; still he could and ought to keep the horse till the plaintiff called for him; and thus keeping him, he could, in my opinion, use him moderately in recompense. In *Bagshaw v. Howard* (Cro. Jac. 148), it is said by the court, that to use a stray horse, by riding or driving, is tortious, there being, as they say, no difference between this case and the case of a distress, for he hath it by authority in law. Here the defendant hath the horse by delivery of the plaintiff. I think the rule should be made absolute.

SHERWOOD, J. (after stating the facts.)—The question is, whether defendant's using the animal was a conversion under the existing circumstances of the case. If it were, then no demand was necessary before the bringing of this action; if it were not, then a demand was necessary and a new trial should be granted. Bailments are trusts cognizable in a

court of law, and must be strictly viewed with reference to the original intentions of the parties ; and if the trustee wilfully acts contrary to the trust reposed in him, the bailment is at an end, and the rights of the parties thenceforward are precisely the same as if no bailment had ever existed. This kind of contract between the parties can only be sustained by the proper exercise of the trust and authority given by the one and accepted by the other ; and an abuse of authority in fact, has sometimes the same effect in destroying the authority itself, as the abuse of an authority in law. In such instances, the only difference in the consequence is, that an agent, acting under the authority of an individual does not become a trespasser *ab initio*, when the act of abuse is in itself a forcible injury ; but one acting under an authority in law does. In the present case, I incline to the opinion that the evidence shews an actual conversion, and consequently that no demand of the mare was required by law. My opinion rests upon the principle of the bailment being destroyed by the wrongful act of the defendant. When he took the plaintiff's mare upon the second bailment, he engaged to settle with Rice for the plaintiff, and to pay him what he could prove to be due, by his own oath or by that of some other person. This solemnity, by the mutual agreement of the parties, was the test of what the plaintiff would admit to be due ; and therefore the defendant should not have held the mare in security for any other amount ; and if Rice refused to prove his debt in the manner prescribed by the plaintiff, I think it was the duty of the defendant to give the plaintiff notice of his refusal. This, however, his counsel at the trial did not intimate was done ; but he insisted that, as defendant did not pay the money conformably to the instructions given him, he might be considered as holding the property without having paid the money at all, and then he could justify the working of the mare for her keep. I do not think, at the trial, that he assumed to hold the mare, when he used and worked her as the depositary of the plaintiff, on a general and indefinite bailment, but as pawnee, for the security of the money advanced by him, contrary to the clear instructions and intention of the plaintiff, and of his own understanding of that intention, and

therefore could have no just claim to be considered as acting in any other capacity. I charged the jury that, in my opinion, the defendant had no legal right to work the animal, because he kept her wrongfully for money paid without any authority from the plaintiff ; and it was on this ground, I think, they gave their verdict. It would be improper, in my opinion, to allow the defendant to repudiate the character of a pawnee, and to set up a holding by a bare and naked bailment, contrary to the real fact. The evidence shows he held the mare as a pledge for the money he paid Rice, and that was the defence he first advanced ; but afterwards, when he failed to prove an authorised payment, he wished to be considered as a mere depository. I thought he had no legal right to work the animal, even admitting that he held it in that character ; but it was not on that ground the jury were directed to give their verdict for the plaintiff, but upon the principle, that the defendant kept the mare and worked her as a pawn, for money paid by him without any authority and against the express direction of the plaintiff, and thereby abusing the trust confided to him. Negligence or mistake on the part of the bailer will not destroy the contract between the parties ; but I think an intentional act, directly contrary to the original design of the bailment, must necessarily have that effect. In 2 Bulstr. 309, the doctrine appears to me to be recognized in the following words : "If a man deliver "another a horse, to ride to York, and he rides him to "Carlisle, an action well lieth. The reason is, that he, by "his wrongful act, hath destroyed the privity of the first "bailment, by doing contrary to it." The action here alluded to is an action of trover and conversion, as appears by Gilbert's Evidence, 127, 6th ed. The Lord Chief Baron says, " If a man lends his horse for a special purpose, and "the defendant abuses him, this is no evidence to maintain "trover ; for though the horse be abused in the journey, "this is not a conversion to the defendant's use, contrary to "the will of the owner on the delivery. But this evidence "to maintain a special action on the case, though not in "trover, for the abuse, is not a conversion to the defendant's "use, for the abuse arises by negligence, which is no use "at all ; and the conversion is a use contrary to the bailment

"which is an act of the defendant, and so they cannot be evidence one of another. But if a man lends his horse to go to York, and he goes to Carlisle, this evidence will maintain trover, for this is an act contrary to the express bailment, and consequently is a conversion of the plaintiff's horse, in the defendant's possession, to his own use." In Salk. 650, the court said, "Trover lies not against a carrier for negligence, but it does for an actual wrong, as if he breaks a box to take out goods." In 4 T. R. 264, I think Mr. Justice Buller clearly recognizes the principle, that if a bailee intentionally and deliberately acts contrary to the trust and confidence placed in him by the bailer, he is guilty of a conversion of the goods he misuses.

Upon the whole, therefore, I think the defendant was guilty of an actual conversion in this case, by designedly and intentionally using and working the mare of the plaintiff, under the pretence of holding her as a pawn for money paid by him, which he well knew was advanced contrary to the instructions and against the intention of the plaintiff. I am of opinion the verdict is right; the act of the defendant being contrary to the bailment, and operating as a destruction of the privity created by that contract between the parties.

MACAULAY, J.—The mare remained in defendant's possession originally with plaintiff's assent, upon an understanding that she was to become a pawn in a certain event. Until the event occurred it was a mere naked bailment, and the event never happened; so that the defendant never had her in possession, except as a mere depositum.—Jones on Bailment, 80-2, 107; Owen, 124; 3 Sal. 268, 163; Holt, 528, 13; 6 B. & C. 36; 1 Taunt. 391. It is clear that a horse pawned may be reasonably worked by the pawnee, as an equivalent for his keep; and I can perceive no good reason why a gratuitous bailee should not be equally at liberty to use such an animal, so far as to indemnify himself in that way for the expense of feeding, &c. As a mere bailee, therefore, I do not think the extent to which the defendant is proved to have worked the mare would constitute a tortious conversion. I think he was legally entitled to use her while in his hands as a bailee, as far as he could have done had she been an actual pawn. He might otherwise be deprived of

all remedy for taking care of the animal : his lien for keep arose, and, the bailment being gratuitous, it may be doubted whether any right of action would accrue for keeping, &c. Then was the defendant guilty of a conversion by another act. It seems he paid 10s., as the plaintiff's debt, without exacting the required proof or the oath of the party. If so, then the payment was unauthorised, and the mare would not become a pledge ; but I do not see how it determined the bailment and worked a wrongful conversion. The plaintiff might have assented. At all events the possession continued with his assent, and the defendant might have claimed a lien when none subsisted, still his mistaken idea of the law did not amount to a conversion. Had the plaintiff demanded back the mare, and defendant refused restoration, asserting a right of lieu by reason of such unauthorised payment, such conduct would be evidence of a conversion ; but in the absence of any demand or refusal, or any dissent on plaintiff's part to the possession held by the defendant prior to action brought, I do not conceive a case of trover and conversion established against the latter.

Per. Cur.—(Diss. Sherwood, J.) Rule absolute.

GOULD V. JONES.

Trover lies against a lock-keeper on the Rideau Canal, for not delivering up lumber seized and detained by him under the provisions of the Rideau Canal Act, for obstructing the navigation, on a tender of the charges occasioned by such seizure, and the removal of the obstruction.

Trover. Plaintiff was taking a quantity of timber down the Rideau River, and stopped with it a short distance above one of the dams erected across that stream to improve its navigation, under the Rideau Canal Act. By some accident, part of the timber escaped from the boom which confined it in the stream, and went down as far as the dam, and some pieces of it lodged against the gates of a lock made in the dam, and wholly obstructed the navigation. No boat or other craft could pass up or down the canal at that point while the timber lay there. The residue of the timber lodged against a boom placed across a waste channel, out of the usual course of the navigation of the canal. The defendant was a lockmaster, appointed by the officer in charge of the

works, and had the superintendence of the locks, against the gates of which a part of the timber rested. He seized the timber which lay against the gates of the lock, as well as that which lay against the boom across the waste channel, and caused it to be partly drawn out of the water, the one end of it being on the dam and the other in the canal. Two days after the timber broke away the plaintiff missed it, and upon enquiry learned that the defendant had seized it. He then went to the defendant, and offered to pay him all damages and expenses, and demanded his timber. The defendant refused to state the amount of his expenses or damages, and also refused to take any sum from the plaintiff; he said he did not know what they were, and could do nothing in the matter without the orders of Colonel By. At the trial it was insisted by the defendant's counsel, that the timber was not seized under the canal act, but damage feasant. Sherwood, J., who tried the cause, charged the jury that according to the evidence, it was the duty of the defendant as lockmaster to seize a part of the timber for obstructing the navigation of the canal, and that the presumption was that he did so. The jury gave a verdict for the plaintiff, subject to the following point, which was reserved by consent of both parties, on a motion made for a nonsuit: "The defendant is subordinate agent or lockmaster under Colonel By, and what he did was entirely under the orders of that officer, therefore the defendant is not liable on his refusal to deliver the timber, it being a qualified and not an absolute refusal, and the original taking not being tortious."

In Michaelmas Term last, the *Attorney-General* argued the point for the defendant, and *H. Sherwood* for the plaintiff, but judgment was not given till this term.

ROBINSON, C. J.—This is an action of trover, brought against the defendant, who is one of the lock-keepers on the Rideau Canal. The jury have given a verdict for the plaintiff, against which the defendant now moves, principally on the ground, that the refusal by the defendant to re-deliver the property was, under the circumstances, no evidence of conversion, as he was a mere servant, and gave his refusal in a qualified manner, alleging his want of authority, and referring to his superior, Colonel By, the superintendent of the

work, who it seems was at the time residing at Bytown, seventy or eighty miles distant. The defendant, in argument, did not claim to be considered as acting under the Rideau Canal Act (8 Geo. IV. ch. 1), in making the seizure, but desired to rest his case on the footing of a distress made at common law, the timber being damage feasant ; and, as to the effect of a refusal by defendant, being a mere servant or agent, he referred particularly to the case of Mires v. Solbay, 2 Mod. 242.

As the Rideau Canal Act is a public act, which we are bound to notice, we must consider what are the legal consequences arising from the facts proved, with reference to that statute, although the defendant does not rest his case upon them.

To look at the case in both points of view, that is, at common law and under the statute: At common law any chattel may be seized damage feasant, which is trespassing upon land ; and this is laid down broadly, without making any distinction which includes inanimate chattels, or which implies that the chattels, if inanimate, must be employed actively in the commission of some act of trespass ; as, for instance, a net in the hands of a fisherman.—Com. Dig. Distress B. 4. But then the place where the goods are seized damage feasant must be the freehold of the party distraining, or the freehold of him under whom he makes cognizance.—Com. Dig. Pleader, 3 K. 21.

Now, if it were made out in evidence here that this timber was legally distrained damage feasant, and impounded trover would not lie for the detention after tender of the damage, such tender not having been made until after the impounding, as is explained in the Six Carpenters' Case, 8 Co. 292 ; 5 Co. 76 ; Cro. Eliz. 813. On the other hand, if it were illegally seized as a distress damage feasant, then, although damages were tendered, and not till after the impounding, I consider that trover would lie for the detention of it, according to Shipwick v. Blanchard, 6 T. R. 300, and Tinkler v. Poole, 5 Burr. 2659 ; though it had before been held that trover would not lie for goods illegally seized and in the hands of a public officer, on the principle that they were *in custodia legis*. Was this timber, then, legally seized by the

defendant as damage feasant at common law? He proved no freehold in himself on which the timber was trespassing: did he then make cognizance under any one who had the freehold? To know anything of his right, we must consult the Rideau Canal Act, and we must find it there or nowhere, for he proved no particular relation between him and the crown by any commission or authority specifically in proof; he was merely shewn to be a lock-keeper, and then all else is to be inferred, and of course under the statute; and indeed, that the king had a freehold in the *locus in quo* was no otherwise proved than by necessary inference grounded on the statute. It is part of the Rideau Canal, and therefore, although before it was the property of individuals, is now under the third section of the act vested in his Majesty. The next question, then, is, what is the defendant, that he should seize chattels doing damage on the lands of the king? he is a lock-keeper or toll-gatherer. What he is to do, as a toll-gatherer, or as a person employed under any other name by the officer in charge, for removing obstructions to the canal, is to be found in the 13th and 14th sections of the Canal Act. The 13th section can clearly not apply, except in cases where the owner, being present, has been notified to remove the obstruction, and refuses. The 14th appears at first sight only to give a different remedy under similar circumstances, but there is a power given in the clause to any person employed by the officer in charge, to cause the boat, vessel, or raft obstructing the navigation to be removed, and to detain them until the charges occasioned by such removal are paid. Granting that the term raft may, by a reasonable construction (considering the object) be extended to loose floating timber, then a power is here given to seize and detain till the charges "occasioned by such removal are paid." Defendant claims that he is a person authorized to exercise this power; and we are to look to the statute to see what he can do and ought to do, for clearly he has not shewn that he is otherwise authorized. The timber was obstructing the navigation: he had therefore a right to remove it. He did remove it, and had consequently a right to detain it till the charges occasioned by the removal should be paid. The act prescribes the remedy and limits the right. When these

charges (not any damages the timber may have done, for on that head this branch of the statute is silent,) are tendered the right to detain longer ceases ; and I am of opinion, that a refusal to deliver up afterwards, is evidence of a conversion to support trover. I look upon this timber, as merely removed out of the way, not impounded ; and that it was detained under the act till the charges of removal should be paid, not distrained *damage feasant*. I consider further, that the defendant, as to this act, had his duty prescribed to him by the statute ; that he was competent of his own authority to do all that was necessary between the crown and the owner of the timber, although he may have derived his appointment under Colonel By ; and that, for the protection of the subject, he was bound to do so, and could not decline, and content himself by referring to Colonel By, who had no discretion to exercise in the case, the act being explicit, and the only question being the amount of charges of removal, respecting which the defendant was necessarily better informed than the superintendent could be.

The tender was not proved in the ordinary form, but that may be dispensed with by the act of the other party, as to which several distinctions have been taken ; but here, upon reason and principle, the tender must be admitted to have been legally made, because the plaintiff could tender nothing specific till the defendant had stated his charge ; he expressly stated he came to redeem his timber, and asked the amount to be paid, and had money. Defendant said he could state nothing, and made no charge. Then I conceive it followed, that he could not legally detain the timber, and that this verdict was rightly rendered. If loose floating timber cannot be considered as coming under the clause cited from the Rideau Canal Act, it would then, I think, reasonably follow, upon the maxim that "*mentio unius exclusio est alterius*," that the authority given to the toll-gatherer, or lock-keeper, extended only to boats, vessels or rafts, and that he should have a general authority at common law to seize loose timber as a distress, merely because it is a *casus omissus* in the statute, is what cannot in my opinion be maintained.

SHERWOOD, J.—The defendant's counsel, to support his motion for a nonsuit, cited as authorities 2 Mod. 242 ;

5 B. & A. 247 : I think, however, the position is not sustainable. The defendants in those cases acted merely as servants, and the legal possession of the goods was in their employers and not in them, and they had no control over them. In the present case, the defendant was a public officer, acting under the provisions of an act of the legislature and consequently responsible for his conduct, like all other public officers. The 14th section of the provincial statute, 8 Geo. IV. c. 1, before mentioned, is in the following words : "That if any boat, vessel or raft, shall be placed in any part "of the said canal, so as to obstruct the navigation thereof, "and the person having the care of such boat, vessel or raft, "shall not immediately, upon the request of any of the persons employed by the officer in charge, made for that purpose, remove the same, he shall, for every such offence "forfeit a penalty of ten shillings for every hour such "obstruction shall continue ; and it shall be lawful for the agents, toll-gatherers, or others employed by the officer in charge, to cause any such boat, vessel or raft, to be unloaded, if necessary, and to be removed in such manner as shall be proper for preventing such obstruction, and to seize and detain such boat, vessel or raft, and the cargo thereof, or any part of the cargo, until the charges occasioned by such unloading and removal are paid.

It appeared in evidence, that the plaintiff was the owner of the timber in question, and was conveying it along the river Rideau, together with other timber ; and that by some accident, without his knowledge, some pieces were placed, by the current of the stream, against a lock erected in a dam thrown across the river. The timber was placed in such a position as wholly to obstruct the navigation. No boat or other craft could pass while the timber lay there. If the pieces of timber lying against the lock could properly be called a raft, I think it was the duty of the defendant, as lockmaster, to remove it, under the 14th section of the act, from obstructing the navigation ; and if it were his duty, he must be presumed to have done it for that purpose. The lumber, I think, was a raft, within the meaning of the act. The definition of that term I take to be, any number of planks, or pieces of timber, conveyed together by water from

one place to another for any purpose. Supposing then that the defendant, as a lock-master appointed under the authority of the act, removed the lumber, conformably to the 14th section, for obstructing the navigation of the canal it remains to enquire, whether he could lawfully detain it after the plaintiff offered to pay him the charges of removal, and demanded the lumber. The 14th section of the act confers on the lock-masters two separate and distinct powers, and they may exercise the first quite independently of the second. In the first place, they have authority to remove all rafts obstructing the navigation ; in the second place, they are empowered to seize and detain such rafts till the charges of this removal are paid. Now I think it is their bounden duty to remove a raft which obstructs the navigation, but it seems to me quite discretionary with themselves whether they will seize and detain it afterwards for the charges of removal. The charges may be too small to justify such a measure with any semblance of propriety, or the peculiar circumstances of the case may induce the lock-master to grant an indulgence to the owner by giving him a credit to a future day. As there is nothing in the act to the contrary, it is easy to imagine such indulgences may sometimes be given. If the lock-master seize the timber, he can legally detain it till the charges of the removal are paid, but no longer, by the express terms of the act. It must be his duty, therefore, to ascertain the amount of the charges, and to state the amount to the owner, when he requests to know it for the purpose of making payment. If the lock-master refuse to state the amount when requested, then all the owner can do is, to offer payment of all charges in general terms, and demand his property, after which the detention, in my opinion, is tortious, and presumptive evidence of a conversion. The authority to detain the property is special and limited ; that is to say, until the charges of removal are paid, but for no other purpose. Suppose, for instance, the lock-master had stated to the plaintiff the amount of the charges of the removal, as it was his duty to do, and the plaintiff had paid the full amount of them, but the lock-master had notwithstanding detained the lumber, and refused to allow the plaintiff to take it, what would be the remedy in such a case ? It

appears to me the payment of the charges of removal would put an end to the lock-master's special authority for detaining the lumber; and its detention therefore was equally tortious as if no charge had ever been due; and after demanding the lumber, I think he could sustain trover. Now I consider the present case similar in principle to the hypothesis just stated. It was the duty of the defendant to ascertain the amount of the charges, before he seized and detained the lumber to secure their payment; and he should have given notice of the amount to the plaintiff when he requested the information. A tender or offer to perform a particular duty, which tender or offer is rejected by the person who is entitled to the duty, is in law as good and effectual as an actual performance, for the purpose of enabling the person interested to support any action dependant on the performance of the duty.—*I Saund.* 320; *Doug.* 686; *8 Ea.* 443. Presuming, therefore, that it was the duty of the defendant as lock-master, under the authority of the act, to remove the lumber which lay against the lock, and that he accordingly did so, and that he afterwards seized and detained it by the same authority for the purpose of obtaining payment of the charges of removal—I am of opinion, the objection contained in the point reserved at the trial, was not sufficient to entitle the defendant to a nonsuit. I think the verdict should not be disturbed. I have incidentally said, the defendant's counsel at the trial contended that the lumber was not taken under the Canal Act, but for damage feasant at common law. Although this objection has nothing to do with the determination of the point reserved, still as it was advanced in the progress of the trial, and if it be sustainable may make it doubtful in some degree what remedy the owners of goods seized and detained by lock-masters can resort to, I think it proper briefly to state my present views of the subject. There can be no doubt that the Rideau is a public navigable river; and I think the canal connected with it, is as much a public navigable water as the river itself. The question then is, whether goods conveyed along public navigable waters, in the usual course of commerce, can be taken as damage feasant for any injury occasioned to the public works erected for the improvement of the navigation, and during the

ordinary passage of such goods for commercial purposes ? I incline to think, this position cannot be sustained by any established principle of law ; for goods cannot be taken damage feasant in my opinion, if the owner had a legal right to place them where they were found, and where they were seized. In the present case, the plaintiff had a right to float his timber in the river or canal, on its way to the ultimate place of destination ; and if it accidentally escaped from the place where he intended to land and leave it, and went further down the river than he wished, I think that circumstance can make no difference. Whether that was the fact or not does not appear by the evidence. Where goods are conveyed in a navigable river, and in their progress they injure a private person, an action of trespass, or case, according to the circumstances, may be brought against the owner ; but if they obstruct the navigation of the stream, or occasion injury to the public works erected for the improvement of the navigation of the river, that, I think, is a public nuisance, and of course an offence against the community at large. Mr. Russell, in his able treatise on crimes and indictable misdemeanours (1 Russell on Crimes, 339,) remarks, "that "in books of the best authority, a river common to all men, "is called a highway ; and if it be considered as a highway, "any obstruction by which its course and the use of it as a "highway by the king's subjects are impeded, will fall within "the same principle as those which relate to public roads." I incline to think the public works which have been or may lawfully be erected on the river Rideau, under the Canal Act, are protected from injury by the common law to the same extent that bridges on a public highway are protected, and that all timber and wood floating in the river or canal, which come in contact with the works, and are unnecessarily allowed to remain against them and injure them, or thereby to render the navigation less commodious, are public nuisances, and may be abated by any one, if the owner or person in charge refuse or neglect to remove the timber or wood for an unreasonable time.

I think the defendant in this case had no right to seize the timber of the plaintiff, damage feasant because it was lawfully floating in the canal in the ordinary course of

business ; but I at the same time incline to think he had authority by the common law to remove it as a nuisance, by obstructing the free use of the water, and by injuring the public works erected to improve the navigation under the sanction of an act of the legislature. A person who removes the goods of another which occasion a nuisance, cannot justify their detention after the nuisance is abated ; and consequently the defendant was not entitled to a verdict or nonsuit, had he rested his defence on that ground.

MACAULAY, J.—It does not appear to me that the timber in question can be legally regarded as seized under the Rideau Canal Act, which imposes penalties upon the persons in charge of any boat, vessel or raft placed in any part of the canal so as to obstruct the navigation thereof, not removing the same upon request, and authorizes the agents, toll-gatherers and others employed by the officer in charge, to cause any such boat, vessel or raft to be unloaded and removed, and to *seize and detain such* boat, vessel or raft, or the cargo thereof, or any part of such cargo, until the charge occasioned by such unloading and removal be paid. The loose, stray timber did not constitute a boat, vessel or raft, and the act seems to contemplate a boat, vessel or raft of which some one might be in charge : at all events, it only sanctions seizure thereof to enforce payment of the expenses incurred in removing and unloading *such* boat, vessel or raft, as is therein mentioned. Stray timber clogging the canal or injuring the banks or gates, seems to me rather to constitute a nuisance, and removable as such, or liable to distress at common law damage feasant by the king or his officers. If this timber was legally seized and held under section 14 of the above act, I am disposed to think, after tender and refusal of amends, trover would lie against the person seizing, if an agent, toll-gatherer, &c. The act authorizes such persons to seize *ex officio*, and not as mere servants : having the discretion to seize, and the opportunity of knowing the expense, they are, I think, entitled to accept payment of the latter, and to restore the property on payment thereof. Indeed, the amount for which the seizure is made should be ascertained and declared before or at the time thereof. The removal or unloading does not constitute the seizure ; but

the seizure should follow the removal, to enforce payment of the charges attending it. The evidence does not shew that defendant did seize the timber for any expenses of removal, under the act; and if not, his holding it, though not seized, would amount to a conversion, unless it was distrained damage feasant; between which, at common law, and a seizure under a statute, the books note a distinction. If seized or distrained at all, I should think the act more properly to be regarded as a distress damage feasant, or as the removal of a nuisance. In the latter case, the detention would be unlawful, and offer evidence of a conversion. In the former case, there is no sufficient evidence of impounding, so as to embarrass the party seeking an ulterior remedy after tendering amends. When the taking or detention before impounding is unlawful, replevin seems the regular mode of relief; after impounding, it seems questionable what should be the party's course. But inasmuch as upon tender of amends, before impounding, a rescue is sanctioned, I should incline to think trover would lie upon a demand and refusal, unless the circumstance that the amount of damage is not assessed or ascertained might present an obstacle, and I fear it would. Here, however, any sum exacted was offered, and none was named. The tender was inchoate only, owing to the refusal, and the refusal was, to be sure, qualified and not absolute; but such qualification was unreasonable in this case. No apparent necessity for reference to the head officer existed; and unless such a reference be desired on reasonable grounds shewn, the agents or toll-gatherers who seize should name the damages charged, because they act as *quasi* principals, and have generally the best opportunity of judging. If a lock-gate were broken, or any serious or trifling injury done, which they could not be presumed capable of estimating, a reference in that case to the commanding officer would be reasonable, and the refusal excusable; but such a case would not fall within the 14th section of the statute, being a distress damage feasant. Looking to the present case, the damage was merely nominal, and the defendant of course knew the expense of the distress; his reference to Colonel By was not therefore reasonable. The defendant does not appear to have im-

pounded the timber, or to have placed it where it lay *ea intentione*. Certainly no ulterior destination was contemplated ; but, notwithstanding, I incline to regard it as merely distrained and not impounded, and to look upon the tender of amends as made after distress and before impounding. This is the most favourable view for the plaintiff that I can take of the case ; and even then my researches impel me to the conclusion, that replevin was the proper remedy, although I am not prepared to say that trover is not sustainable, under the circumstances proved.

It does not follow, in my opinion, that because the public have an easement in the canal by the provisions of the statute, paying the toll dues—in other words, that because it may be regarded as a public navigation *sub modo*, i. e. paying tolls, that therefore the king, in whom the fee simple is, subject to such easement, cannot distrain anything damage feasant in this line of navigation—that is, when an injury accrues to the estate beyond a bare infraction of the public right, as respects the public easement, the obstruction might be a common nuisance and indictable ; but as encumbering the king's estate, as doing damage thereto, the obstruction would also be a substantive injury to him, and the property be therefore liable to a distress damage feasant.—2 Mood. & Malk. 21.

MACAULAY, J., *dubitante*.

Per Cur.—Rule discharged.

DOE EX DEM. BELL V. ROE.

Where several tenants occupied different apartments in one house, as several tenements, *Held*, that the single action of ejectment might be brought for the recovery of the premises, serving each tenant with a copy and notice.

Sullivan moved to set aside the service of the declaration in ejectment, under the following circumstances. There were three tenants in possession of the house for the recovery of which the action was brought, and a copy of the declaration for the whole premises, with the usual notice, was served on each tenant. Affidavits from the tenants were produced to shew, that they did not occupy the whole house jointly, but distinct apartments in it severally ; and *Sullivan* con-

tended that they should have been sued in several actions, as tenants of distinct premises.—*Sed non allocatur*; for

THE COURT held the action properly brought, and that each tenant could defend, if he pleased, for his own portion only.—*Vide* 1 Ch. Rep. 141; 2 T. R. 639; 4 M. & R. 569; 3 Moor. 578; 7 T. R. 477; Bull. N. P. 98; 2 Ch. Rep. 176; 4 B. & C. 259; Adams, 202,235; 5 Moor. 73; Burnes, 176; 1 B. & P. 369; Llofft, 301; 2 Sellon, 144.

Rule refused.

SHELDON ET AL. V. HAMILTON.

Where a party, having been arrested, was discharged on a mere clerical mistake in the affidavit to hold to bail, the court refused to discharge him from a second arrest for the same cause of action.

The defendant had been arrested at the suit of the plaintiff, for goods sold and delivered, and was discharged on account of a clerical error in the affidavit to hold to bail. The plaintiffs discontinued, and brought a second action, and held the defendant to bail upon a new affidavit.

Spragge moved to set aside the arrest, upon the general ground that a party cannot be twice held to bail for the same cause.

The *Attorney-General* shewed cause, and cited 2 Wils. 381.

THE COURT held, that when the first arrest was not vexatious, a second arrest was allowable; and it was to be inferred from the nature of the proceedings, whether such was the case or not. In this case, on the discharge of the defendant from the first arrest, costs were not imposed on the plaintiffs, nor was the defendant restrained from bringing an action, which distinguishes it from some of the cases in the books. The mistake here was clearly not for the purpose of harassing: it was an error which probably arose from the clerk who copied the affidavit. Under all the circumstances the second arrest is allowable.—1 Str. 439; 2 Wils. 381; 3 Ea. 312; 1 Ch. Rep. 161, 274; 3 D. & R. 33; 3 Moor. 607; 15 Ea. 631; 6 T. R. 218; 3 M. & S. 153; 5 M. & S. 93; 4 Camp. 214; 1 Stark. 49; 8 East. 334; Burnes, 399; 5 B. & A. 905; 7 Taunt. 192; Lord Raym. 670; 4 Moore, 294; 1 B. & B. 289, 514; 1 Marsh. 395; 5 Taunt. 251; 1 N. R. 13.

Rule discharged.

PRIESTMAN V. KENDRICK AND BERNARD.

Where the defendant received two horses from the plaintiff to sell at a certain price, and without his authority or assent sold them at a less price : *Held*, that he was liable in trover for the difference.

Trover for two horses. They were delivered by the plaintiff to the defendant Kendrick, for the purpose of being sold to the use of the plaintiff, at a price particularly fixed by the plaintiff at the time of the delivery to Kendrick. He, however, sold them for a less price than that to which he was limited, to Bernard, the other defendant. Previous, however, to this sale, a writ of *fi. fa.* was sued out by a creditor of Priestman, the plaintiff, and put into the hands of the sheriff of the Home district, under which a levy was made upon the horses, then in Kendrick's possession. The sheriff agreed with Kendrick to leave them in his possession to be sold, provided the proceeds of the sale were handed to him ; and when Kendrick sold the horses, he paid the money he received for them from Bernard to the sheriff, by whom it was accounted for upon the execution he had against the goods and chattels of the plaintiff. At the trial at the last assizes for the Home district, *coram* the Chief Justice, the jury found a verdict for the plaintiff against Kendrick, for the difference of the price for which the horses were sold and that fixed upon them by the plaintiff as the selling price, and in favour of the defendant Bernard ; and in Michaelmas Term, *Washburn* obtained a rule *nisi* to set aside the verdict, on the ground that the seizure by the sheriff destroyed the bailment to Kendrick ; and that Kendrick, in the sale which took place subsequently, was to be looked upon as the agent of the sheriff, who was not bound down to any particular price at which to sell.

The *Attorney-General* shewed cause, and contended that Kendrick could not shelter himself under this pretext, because it was not in the sheriff's power, and he could not consequently authorize another to sell without a regular notice, and that any sale made by Kendrick was to be viewed as made under the authority derived from the plaintiff. That having exceeded that authority in the sale, he must answer it in damages ; and that trover was a proper remedy, as the sale made was, under the circumstances, a conversion. He cited 2 T. R. 4 ; 4 T. R. 260.

Judgment was not given till this day.

ROBINSON, C. J., and MACAULAY, J., were against a new trial. They held, that when one of two defendants is properly acquitted, a new trial is not granted—at least in a doubtful case.—*2 Sal. 362; 12 Mod. 275; 2 Str. 814; Bull, N. P. 326.* The only question here is, whether Kendrick should be sued in this form of action, or whether another should have been adopted? Kendrick is liable in trover, if the plaintiff repudiated his contract of sale.—*15 Ea. 45, 407; Holt. N. P. C. 278; Paley, 165, 171.* But the other defendant would only be liable in trover, upon notice that the plaintiff refused to abide by the unauthorised sale of his special agent, who exceeded his authority, and after a demand and refusal. By the act of sale was itself a conversion in Kendrick, if the plaintiff refused to concur in it. There is no evidence that he adopted it, so that the right of action in trover seems to subsist.—*3 T. R. 357.* If not, he could clearly recover the difference of value, in case, for the excess of authority in his agent; and as he only recovered the difference here, the same result would or ought to attend a future suit upon the same subject-matter.

The question is not whether any action lies, but whether it should be trover, or a mere special action on the case? that is, whether case lies in one form or another? The merits have been fully discussed in the present suit. It does not appear that it was a sheriff's sale, or that the defendant Kendrick sold as agent of the sheriff, but of the plaintiff. Had the contrary appeared, or had it been shewn that the plaintiff indirectly adopted the sale by his arrangement with the sheriff, who received the proceeds, the action then would not be sustainable. But no such evidence of assent was given.

SHERWOOD, J., differed.—It is very clear the possession of the property was taken from the plaintiff and vested in the sheriff, by the seizure under the writ of execution; and I see nothing in the evidence to shew, that the possession was returned to the plaintiff. It does not appear by the evidence that the plaintiff assented to the arrangement between the sheriff and Kendrick, or had any notice of it; and as Kendrick sold the horses, and paid over the price to the sheriff,

conformably to the arrangement, without rendering any account to the plaintiff, the presumption is, he acted under the authority of the sheriff after the seizure, and not under the bailment from the plaintiff. You must either suppose the sheriff relinquished the seizure, or you must suppose that Kendrick sold the horses by his permission. Now I think it would be improper to presume the sheriff relinquished the seizure. It was his duty to retain it, to meet the exigency of the writ of execution, and the legal presumption is that he did ; and this presumption is greatly strengthened by the fact of his requiring the proceeds of the sale of the horse's to be paid over to him in satisfaction of the writ. It may be said, it was the duty of the sheriff to give eight days' public notice of the sale of the property before it was sold, and so it was ; but it does not necessarily follow, from his failure to give the requisite notice of sale, that he relinquished the seizure which he had actually made under the writ. It strikes me, from the whole scope and bearing of the testimony, that the sheriff concluded the horses would bring a better price at private than at public sale, and that this was his only reason for allowing Kendrick to sell them. The event most probably proved his opinion to be correct, so far as the amount was in question ; but the legality of omitting to give public notice of the sale, is a consideration wholly distinct from the other. The legality of relinquishing the seizure, or of omitting to give notice of the sale of the property, might be litigated by any of the parties interested, according to the fact of the case ; but the only question here is, whether the seizure was given up ? I have already said, I think it was not. Presuming that to be the fact, from the evidence given at the trial, it remains to trace its effect on the present suit. To support the action of trover, it is requisite for the plaintiff to prove, that at the time of commencing the suit, he not only had a right of property, but a right of possession also ; and unless both these rights concur, the action will not lie, although a right of possession is sufficient without having the actual possession, when there is a right of property.—7 T. R. 9. In the present case, the absolute property in the goods was in the plaintiff ; but neither the possession nor the right of possession was in him.

The seizure of the sheriff divested the plaintiff both of his possession and of his right of possession ; and I am not aware of any testimony given at the trial, which established that the sheriff relinquished the possession of the property to the sheriff—I mean, there was no conclusive evidence. I do not understand the fact was admitted, or that the question was left to the jury ; and therefore I think the cause should be sent back to another jury, to determine the fact, and to render a verdict, either for the plaintiff or the defendant, according to the event. By 49 Geo. III. ch. 9, s. 5, the sheriff is bound to give eight days' public notice of the sale of all goods seized under a writ of *fi. fa.* ; but I consider that statute merely directory, and that it renders the sheriff liable to an action on the case for not conforming to its provisions, but the sale in my opinion is valid to a purchaser without notice. The omission of the sheriff to give public notice of the sale is not therefore conclusive of his abandonment of the seizure. That is a question for the jury to determine.

Per Cur.—Rule Discharged.

SHERWOOD, J., *dissentiente.*

DOE DEM. CLARK ET AL. V. MCQUEEN.

Where after plea pleaded in ejectment, the plaintiff was nonsuited because no one appeared on behalf of the defendant to confess lease, entry and ouster, the court, on affidavit that the defendant's attorney had forwarded the title deeds and other documents to counsel for the purpose of making a defence, which did not arrive in time, and on an affidavit of merits, granted a new trial, on payment of costs.

Ejectment for premises in the London District. At the last assizes, no person appeared on behalf of the defendant, and the plaintiff was consequently nonsuited, for not confessing lease, entry and ouster. In Michaelmas term, and after judgment entered against the casual ejector, and writ of possession sued out but not executed, the *Attorney-General* moved to set aside the judgment and the nonsuit, and for a new trial, upon payment of costs. In support of his motion, he read affidavits, shewing that the defendants employed an attorney in York to defend them, by whom the usual consent rule was entered into, and the general issue pleaded. He, after receiving notice of trial, forwarded the title-deeds and

other documents on which the defence rested to the defendants' counsel at London. They did not, however, arrive until after the assizes, which were unusually short, and no defence was made; and the plaintiff was nonsuited for non-confession of lease, &c. One of the defendants also swore, that "they had a good and substantial defence to this action as deponent is informed and verily believes." The Attorney-General contended, that the action of ejectment being founded on a fiction, and moulded by the court for the purpose of trying titles and attaining the justice of the case, there was no good reason why the necessary relief should not be afforded at this stage of the proceeding, as well as at any other, in order to give the defendants an opportunity of fairly trying their title, and sustaining their right to the possession of the lands sought to be recovered by the lessors of the plaintiffs. Rule *nisi* granted.

Draper shewed cause, producing an affidavit that part of the premises in question had been held by the defendants, as tenants to one of the lessors of the plaintiff, for a term which has expired. He then contended, that the cases in which the courts have interfered to set aside a regular judgment in ejectment, might be classed in four descriptions, within none of which the present case could be brought. 1st. Cases of collusion by tenant against landlord. 2nd. Neglect (though not fraudulent) of tenant to give notice to his landlord. 3rd. Neglect of third parties (ex. gr. attorneys). In all these cases, the principle of relief seems to me, that the party had no opportunity of making a defence. And 4th. When no trial has been lost, and the party swears to merits, so as to afford a presumption that the possession ought not to be changed.—5 *Taunt*, 506; 4 *Burr.* 1996; 5 *Taunt*. 205; 13 *Price*, 260; 2 *Barnes* 146.

ROBINSON, C. J., having been concerned for the lessors of the plaintiff in a former ejectment, in which that portion of the premises leased to the defendants had been recovered, declined giving any opinion.

SHERWOOD, J.—I think the cases *Doe ex. dem.* —— v. *Roe*, 4 *Burr.* 1996, and *Doe ex. dem.* the *Grocers' Company v. Roe*, 5 *Taunt*. 205, clearly shew that the court has a discretionary power to set aside proceedings in ejectment at

any stage, if they are convinced such an interposition is necessary for the ends of justice. The affidavit produced by the lessors of the plaintiff shews, that the relation of landlord and tenant subsisted between the parties, in consequence of which the defendants were not at liberty to dispute the title. This is certainly a general rule, but there are exceptions to it: the defendant may shew that the landlord's interest was but temporary, and has expired.—
4 T. R. 682; 5 M. & S. 516.

The defendants clearly intended to make a defence, and one of them has sworn they have a good and substantial defence; but it appears they were prevented doing so by a perfect accident, and without any default or negligence on their part. Now I think the possession should not be changed, under such circumstances, till they have an opportunity of making a defence; and therefore it is my opinion the nonsuit and the judgment should be set aside, upon payment of costs, to allow the defendants an opportunity of shewing the nature and extent of the defence stated in the affidavit filed by them. There is nothing to lead one to the conclusion, that the lessors of the plaintiffs will be put to any inconvenience beyond the delay to the next assizes for the District of London, which must be trifling in comparison of the disadvantage to the defendants of losing the possession.

MACAULAY, J., concurred.

Per Cur.—Rule Absolute.

NOTE.—As to entering judgment in this case on the first day of term, *vide* 1 B. & C. 118.

DUDLEY V. MOORE.

One maker of a joint promissory note is not a competent witness for another, who alone is sued, without a release, as he is not indifferently liable to the payee and his co-maker, being liable in an action by the latter for contribution to both damages and costs.

This was an action against one of two makers of a joint and several promissory note. The signature of the defendant was proved by the plaintiff, who there rested his case. On the part of the defendant, the other maker of the note was called, when it was objected that he being a party to that instrument, was an incompetent witness for the defendant, as

interested. The identity of the party, and his having joined in the note, were not disputed ; but it was contended, that although a maker, he was, as being omitted in an action on a joint and several note, qualified to bear testimony in favour of the other maker. Macaulay, J., who tried the cause, allowed him to be sworn. In the course of his testimony, he proved an agreement between the plaintiff and defendant respecting a sale of lands, upon which was indorsed a receipt for the note in question, as being (when paid) in full of the first instalment, from whence it appears that the witness was a mere surety, having no apparent interest in the purchase of the land. The peculiar situation of the witness was conceded upon its suggestion, and the case was not rested on the ground of his being a surety, but that a co-maker not sued was a competent witness. Nothing was said on either side touching a release from the defendant to the witness. The defendant had a verdict, and *Draper* last term obtained a rule nisi for a new trial, on the objection taken at the trial to this witness's competency. The case stood over upon an enlarged rule till this term, but it was not formally argued by the defendant's counsel.—5 M. & S. 71 ; 2 Moor. 9 ; 2 Esp, 705 ; 5 Esp, 119 ; 1 Esp, 177 ; Peake, 224 ; 4. Taunt. 464, 752 ; 1 Taunt. 378 ; 6 Bing. 181 ; 6 M. & S. 158 ; 8 T. R. 308 ; Peake. 175 ; 9 Moor. 272 ; 1 Esp. 103.

THE COURT, upon a full consideration of the cases, held the witness to be incompetent, and that a new trial should be granted without costs, because the witness is liable to contribution, not only for the damages, but also for the costs recovered against the defendant, and consequently has a direct interest in the event of the suit : and

MACAULAY, J., said that the peculiar nature of the witness's liability gave him an immediate interest in the event of this suit, so that without a release he was incompetent. At the same time the above conclusion, drawn from a review of the cases, might be questioned upon the principles on which a suit at law for contribution was originally established. If a surety defends a suit, he cannot call upon his co-surety to contribute to the costs of such suit or defence (though he may as to the debt), unless the party assented to the defence or concurred in it. And it is difficult to point out a distinc-

tion upon which a joint debtor in a single isolated transaction, as upon a note or bill, should be subject to a more rigid rule. Both are equally bound to pay, and if one chooses to defend without the knowledge or privity of the other, that other might reasonably dispute his liability to contribute to the costs, at least in very many instances. In *partnerships* the liability to contribute costs is clear, and I think more just than as between mere joint contractors or debtors in a single transaction; however, the cases taken altogether seem to point out the same rule with respect to all principal joint debtors or contractors, without regard to partners, as contrasted with isolated transactions.—5 T. R. 578; 7 T. R. 481, 601; 2 Ea. 458; 14 Ea. 566; 1 Vern. 456; 2 T. R. 105; 2 Esp. 478; 1 M. & M. 247; 6 Bing. 306; 1 Bing. 45, 692; 1 Str. 35; 13 Ea. 175; 1 Gow. 113; 1 C. & P. 73; 2 B. & A. 51; 2 B. & C. 558; 1 D. & L. 88; 8 B. & C. 407; 2 B. & C. 72; 1 M. & M. 430; Holt. 390; 4 Mon. 340; Holt. 399; 1 M. & M. 127; 1 R. & M. 29; 4 M. & S. 480; 4 Esp. 112; 2 Stark. N. P. C. 414; 5 B. & C. 385; 2 Bing. 133; 6 Bing. 180; 10 B. & C. 578; 9 D. & R. 700; 4 Bing. 649; 4 Burr. 2254; 2 Esp. 552; 3 T. R. 308; 4 Taunt. 752; 2 Camp. 334.

Per Cur.—Rule absolute.

MFARLANE V. McDougall.

A surveyor of streets, appointed under the provincial statute Geo. IV. c. 9, does not come within the protection of the 34th sec. of the 50 Geo. III. ch. 1, which requires actions for anything done under the authority of that act to be brought within three months.

Case for an injury to the plaintiff's reversionary interest. The defendant had been appointed a surveyor of streets for the town of Niagara, under the provincial statute of 1824, c. 9, and was by an order from the justices of the peace directed to open a certain street within the town of Niagara, therein described, forty-five feet wide. The defendant afterwards opened it to the width of sixty feet, and the excess of fifteen feet of land was the property of the plaintiff, and was then in the possession of his tenant for a term not yet expired; after the plaintiff's case was closed, a nonsuit was moved, on the ground that the defendant was entitled to notice of action under the 24 Geo. II. ch. 44, and on refer-

ence to the statute of 1810, for the purpose of seeing whether that affected the question of notice, a further objection was raised on the 34th clause of that act, viz., that the action was not proved to have been commenced within three months from the time of the injury complained, and on this objection the plaintiff was nonsuited.

E. C. Campbell obtained a rule nisi last term, to set aside this nonsuit, and for a new trial, the statute of 1824, which regulates the appointment of street surveyors, containing no clause which limits the time for bringing the action.

Draper shewed cause, contending that the order of the magistrates, under which the defendant acted, was to open a new street, which was done, under the authority of the statute of 1810; and although the appointment of the defendant as street surveyor was under the statute of 1824, yet the particular act, which is the foundation of this suit, was by virtue of the statute of 1810. The order of the magistrates was to open a new road. It appeared in evidence there was no original reservation in the *locus in quo*. It is not to be assumed that the magistrates gave this order without the previous steps which would legalize it; and such previous steps are pointed out and authorized by the act of 1810. The defendant then was ordered to open a new road, which that statute authorized; and he was consequently doing an act which that statute legalized; and is therefore entitled to its protection.

THE COURT held that this case did not come within the statute of 1810, so as to require the action to be brought within three months, but that it came within the act of 1824, which contains no such limiting clause. They held also that the defendant was not entitled to notice under the statute 24 Geo. II, ch. 44; but the Chief Justice expressed his opinion that the later statute did apply, so as to require the action to be brought within six months.

Per Cur.—Rule absolute.

SHAW V. MATTHISON.

The right of action on a note payable to A. B., or bearer, does not accrue to a third person as bearer, till an actual delivery to him. And when C., being in the United States, purchased a note payable to bearer, and on his coming into this province got possession of it, and brought an action upon it, to which the defendant pleaded *actio non accredit infra sex annos*; and plaintiff replied he was in foreign parts when the cause of action accrued. Held, that the facts did not warrant a

verdict upon this issue for the plaintiff, as the cause of action accrued to him when he received the note, which was within six years, and within this province, and not when he made the purchase in the United States.

Assumpsit. The plaintiff sues as bearer of a promissory note made payable at a certain day after date, and transferred after it became due. Plea: *non assumpsit* and *actio non accrevit infra sex annos*. Replication, that the plaintiff was in foreign parts when the action accrued, on which issue is taken. The note was payable to the father of the plaintiff or bearer, in June, 1823, and the payee was in this province in the month of August following. The note was sold to the plaintiff in the autumn of 1831, while he resided in the States, but it was delivered to him at Perth some time in the winter of 1832. The cause was tried at the last assizes for the Bathurst District, *coram* Sherwood, J., who charged the jury in favour of the defendant. A verdict was however rendered for the plaintiff.

Radenhurst applied to set aside the verdict and for a new trial, and obtained a rule nisi last Michaelmas term.

Boulton, Jas., shewed cause, relying on the case in 16 Ea 420.

Judgment was this day given.

ROBINSON, C. J.—I have no doubt that, on the reason of the thing, the statute runs from the promise (i.e., here, the making of the note), unless prevented by some exception allowed by the statute, and that this time cannot be prolonged or the debt virtually revived by an indorsement or transfer to a third person.—6 Mod. 131; 2 H. Bl. 161; 2 Pr 428. The right of such third person accrues under the original promise, though not without transfer, but the transfer is independently of the matter. Here the issue is, whether the plaintiff, when the action accrued to him, was in parts beyond the seas. According to the evidence, I think it apparent that the plaintiff, when the action accrued to him, was in this province; if so, the issue should have been found against him, and verdict for the defendant. As to the first proposition, I think the pleadings have the effect of restricting us to the enquiry, where the plaintiff was at the time the action accrued to him, since the defendant has not by demurring objected, as probably he might have done to that

narrow form of pleading, but has taken issue on the fact. I think a note payable to bearer is only transferable by delivery.—5 Pr. 428. It is said here, that plaintiff in the United States had bargained with the original payee for this note, and *had paid him for it*, the note being then in Perth, in the hands of the payee's agent, by whom it was subsequently delivered to the plaintiff when he came into this province.

I am of opinion, the verdict in this case should have been for the defendant on this issue, and therefore that a new trial should be granted.

SHERWOOD, J.—(After stating the case.) Where a note is over due, that alone is a suspicious circumstance, and makes it incumbent on the party receiving it to satisfy himself that it is a good note, and if he omit to do so he takes it on the credit of the indorser, and must stand in the same situation as the holder at the time it became due.—7 T. R. 427, 630; 2 Stark. 251. When the plaintiff bought the note in this case, the payee's right of action had been barred by the Statute of Limitations for some time previous. The issue on the special plea in form is this, that the plaintiff was not in foreign parts when the cause of action accrued to him, but as the plaintiff stood in the place of the payee, I think the issue in substance is, that the payee's right of action existed when he sold the note. Now, as I said before, the right of action of the payee had been lost before the plaintiff bought the note, and therefore I think the verdict should have been given for the defendant, and I charged the jury accordingly.

The verdict was ultimately taken by consent, subject to the following point alone : “Whether the defendant's plea ‘should not have been *non assumpsit infra sex annos*, instead ‘of *actio non accrevit infra sex annos*, as it stands on the ‘record.’” I think the latter mode of pleading the more correct in this case, and therefore the verdict in my opinion should have been given for the defendant.

MACAULAY, J.—The plaintiff should have taken issue on the plea of *actio non accrevit*, for the action did accrue to him within six years as bearer, though the note was outlawed as to the holder, and as to bearer too, if the defendant had pleaded with necessary precision. As the issue is joined,

the plaintiff avers that when the cause of action accrued to him, he was out of the province, &c.; and the question is, when did the cause of action accrue? was it upon the purchase and delivery of the order to receive the note in the United States, or upon its actual delivery at Perth? It appears to me the note was under the original holder's control, in his possession and at his risk, until delivered to the plaintiff, and that the plaintiff only became entitled to sue upon it as bearer when he received it into his possession at Perth; so that in truth he was not abroad, but at Perth and within this province, when the action accrued to him, and the facts established the issue against him.

Per Cur.—Rule absolute for new trial.

MOSIER V. MCCAN.

The court refused to set aside an attachment against an absconding debtor, upon the ground that the debtor had been previously held to bail for the same cause of action, and the bail had been discharged from their liability by a reference to arbitration.

The defendant having been held to bail, his bail were discharged by reason of a reference to arbitration. After this the defendant left the province, and the plaintiff issued an attachment in the same suit against him on the usual affidavits; and an application having been made to set aside this attachment as irregular.

ROBINSON, C. J., and SHERWOOD, J., were of opinion, that as the right to bail, in case the defendant returned to this province, was not the only advantage a plaintiff was entitled to under an attachment, and that even if the defendant by returning could have the attachment avoided without giving bail, it was no reason why the plaintiff should not have the remedy against his property, if he never returned.

MACAULAY, J.—The first question is, whether an attachment can issue *pendente lite* in the same suit. If so, whether after the defendant has been discharged from arrest by the course taken, an attachment lies, being virtually a step to renew bail. 1st, the act of 1822 authorises an alias *ca. re.* to arrest, though the suit commenced by non-bailable process. The attachment law is silent on this head. The attachment is a collateral proceeding; it can accompany a

attend to the matter, a subsequent rule of court was made without producing the desired effect ; and ultimately the parties, by their agents, agreed to refer the matter to the judge of the district court of the district of Bathurst who should first go to Perth, and in case the defendant should neglect to get the matter settled during the judge's stay at Perth, judgment should be entered for the plaintiff. Mr. Jones, being a judge of the district court for that district, subsequently went to Perth, and both parties appeared before him as the arbitrator, under the agreement before mentioned, made their statements, adduced their evidence and entered fully into the merits of their respective cases. Mr. Jones then left Perth, and afterwards made and published his award in writing, by which it was declared that the plaintiff in that suit had proved no cause of action against the defendant (the present plaintiff,) and that judgment be entered accordingly. The rules of court, and the agreement of the parties, directed the costs to abide the event of the arbitration. Merrills went to reside in the United States, and this action was brought against the defendant alone to recover the amount of the costs taxed by the master in the first mentioned suit. The cause came on for trial at the last assizes at Perth, when a verdict was rendered for the plaintiff, subject to the following objections on the part of the defendant : 1st. That the award upon which this action is brought, orders that judgment be entered for the defendants and that it was the duty of the plaintiffs strictly to pursue the award ; instead of which they have proceeded and taxed the costs, and served the allocatur of the master upon the defendants. They were bound to proceed by attachment according to the practice of the court, and there is no implied assumpsit under the circumstances to pay these costs. 2ndly. There is no proof that the individuals who signed the submission were the agents of the parties. The fourth count is therefore not sustainable. 3rdly. A variance between the declaration and the submission produced. The declaration alleges the first arbitrators made no award, and the parties submitted to the judge of the district court who should first come to Perth, without stating anything further. Whereas the submission produced contains a condition, that in case the defendant

ca. re., and why may it not succeed it? 2nd: the effect of the proceeding by attachment being to enforce bail or secure the effects of a fugitive debtor, and the plaintiff having waived his right to the body of such fugitive in this suit, cannot indirectly effect what he could not directly do; he might perhaps, after a discontinuance and payment of costs, proceed in a new suit by attachment, but not I conceive in the same cause.—*I Marsh.* 395; *5 Taunt.* 851.

Draper, for plaintiff. *Dickson*, for defendant.

Per Cur.—Rule refused.

MACAULAY, J. *dissentiente.*

BANK OF UPPER CANADA V. SPAFFORD.

Where no process had been issued against an absconding debtor for about a year after the writ of attachment had been sued out, the proceedings were set aside for irregularity.

Bogert moved to set aside the proceedings in this case for irregularity, and for writs of supersedeas to the sheriff, into whose hands the several writs of attachment against the defendant as an absconding debtor had been placed. The writ of attachment was sued out in Hilary Term, 2 Will, IV., and the defendant did not come in and appear. No writ of *ca. re.* was however issued, or other proceeding taken for about a year.

The court held the delay was fatal, and made the rule absolute.

HALE V. MATTHISON.

A cause was referred to arbitration, costs to abide the event, and the arbitrators having made no award, the parties agreed to refer the cause to any judge of the district court who should first come to Perth; and a district court judge having come there, heard the evidence and awarded that the plaintiff in that suit had no cause of action, and that judgment should be entered for the defendant. *Held*, that the award was good, and that the defendant might maintain assumpsit for the taxed costs of the cause, and was not obliged to enter judgment.

Assumpsit on an award. The defendant and one *Merrills* brought an action on the case some years since against the present plaintiff, and obtained a verdict for the sum of *25l. 12s. 6d.* Afterwards the cause was referred to arbitration under a rule of this court, made in Easter Term, 5 Geo. IV., but the arbitrators therein named, finding it inconvenient to

should neglect to get the matter settled during the judge's stay at Perth, judgment should be entered for the plaintiff; that no award could be made under such circumstances, the condition being in the alternative. 4thly, That Mr. Jones was not the first judge who came to Perth. 5thly. That the award was not made during the stay of Mr. Jones at Perth, and consequently the plaintiff had a right to enter judgment according to the submission, as the award made by Mr. Jones afterwards was not binding. 6thly. That only the costs of suit were to abide the event, but the allocatur includes the costs of the arbitration.

The cause was argued in Michaelmas Term, by *Bogert* for the defendant, and——— for the plaintiff; and judgment was this day given.

THE COURT held that the plaintiff in justice ought to recover, and that none of the objections could be sustained to prevent the plaintiff keeping his verdict; but that the damages should be restricted to the costs of the cause, excluding those of the reference.

SHERWOOD, J.—(After stating the case, and points raised). The fourth count of the declaration expressly states an agreement between the parties to submit to the award of the judge of the district court who should first go to Perth, and the written agreement of the parties produced at the trial sustained the allegation. That agreement contained, in my opinion, as implied promise on both sides to perform the award which the arbitrator should make, and will support an assumpsit on either part.—11 Mod. 170. The direction in the award, that judgments should be entered for the defendants, cannot destroy the promise implied by law from the agreement of the parties themselves, and indeed is nothing more than the legal consequence resulting from the finding no cause of action on the part of the plaintiff's, which the arbitrator distinctly found. The defendants in that suit had the election of entering up judgment as if the verdict had been given in their favour, or of bringing an action on the implied promise to pay what the arbitrator awarded. The next question is, did the award direct the plaintiff's in the first suit to pay anything to the defendants in that suit? I think it did. It is a maxim of courts of law, as well as of

equity, to make every reasonable intendment in support of an award, when no objection is made to the conduct and integrity of the arbitrator.—2 Wills. 267; 8 T. R. 571; 8 Ea. 444; Cro. Car. 434; Cro. Eliz. 66. The award declares the plaintiffs in the first suit proved no cause of action against the defendants, and directs judgment to be entered for the defendants. No one, I think, who reads the award, can entertain any doubt of the intention of the arbitrator. He intended the plaintiffs in the first suit should pay to the defendants all costs which might be taxed, otherwise he would not have ordered that judgment should be entered in their favour. The only fruits of such a judgment would be the amount of the taxed costs; therefore, I think that the award in substance containing a direction that the plaintiffs in the first suit should pay to the defendants the amount of all taxed costs, and as the agreement contains an implied promise to perform the award, this action is sustainable, especially as there does not appear to me anything in the award restrictive of the legal remedies of the plaintiff in the present suit.

2. It appears to me, that the parties, by going before the arbitrator, making their respective allegations, producing their testimony, and submitting fully to his decision, not only admitted that the individuals who signed the submission were their agents, but also that the arbitrator was the first judge who went to Perth after the signing of the agreement. I think the defendant in this action was estopped from disputing either the authority of the agents or of the arbitrator, after such a full and unqualified recognition of it as those proceedings clearly exhibit.—3 Camp. 108; 4 M. & S. 13; 3 Taunt. 78; 5 B. & A. 626; 5 B. & C. 154.

3. The condition here stated, does not seem to me to qualify the agreement to submit to arbitration at all, but is rather calculated to enforce its performance by the super-addition of a kind of penalty for its neglect. It cannot make the agreement an alternative contract, because there was but one act to be performed, namely, to submit the matter to the decision of the arbitrator, and therefore no option was allowed between two different acts. The condition is superplusage, and the agreement would have been the same

without it. Suppose there had been no such condition, and the defendants had neglected to appear before the arbitrator to get the matter settled, the plaintiffs would of course have been entitled to enter judgment on the verdict of the jury, without any reservation in the agreement of the right to do so. I think the agreement is not in the alternative, as this objection supposes. This is not like the case of Penny v. Porter, or Shipham v. Saunders, or like any other case I have met with on the subject of agreements in the alternative.—2 Ea. 1, 4. In both those cases the alternative proposition left an important option with the defendant to do one or the other of two things ; but in the present case, that part of the contract omitted in the declaration is a mere statement of the effect which the neglect of the then defendants must necessarily have produced, whether it was mentioned in the agreement or not. The proof of it, therefore, made no difference in the legal effect of the agreement. I also think the contract was not conditional, but absolute in its nature, in the ordinary acceptation of the term ; for it was morally certain a judge of the district court would be at Perth to perform the duties of his office. Had the submission depended upon some contingency not stated in the declaration, such an omission would have been fatal, according to the cases of Churchill v. Wilkins, 1 T. R. 447 ; and Blyth v. Bampton, 3 Bing. 472. Here there was no contingency to modify or render the agreement conditional. The parties engaged to submit the cause to the first judge who should go to Perth, and the law implied a mutual promise to perform the award when made. What advantage would accrue to the plaintiffs from a failure of the defendant in performing the agreement, is wholly immaterial in an action on the implied promise brought by the present plaintiff for not performing the award on the part of the present defendant. I think that the plaintiffs have stated in the declaration all that is necessary. When the contract consists of several distinct parts and collateral provisions, it is sufficient to state so much of it as constitutes that contract, the breach of which is complained of, containing the entire consideration for the act, and the entire act to be done.—6 Ea. 564 ; 8 Ea. 7 ; 13 Ea. 20 ; 3 Price, 68. I think the part of the

agreement which is omitted in the declaration is immaterial, as in the case of *Thornton v. Jones*, 6 *Taunt.* 584.

4. This objection is answered by the remarks on the second.

5. This objection rests on the ground, that the arbitrator was bound by the terms of the agreement to make and publish his award during his stay at Perth after his first going to that place; but I think that was not the intention of the parties. The agreement states, "that in case the defendants "should neglect to get the matter settled during the judge's "stay at Perth, judgment should be entered for the plaintiffs;" which I think means nothing more than this, that the defendants should be obliged to proceed in the matter with all possible dispatch while the arbitrator was at Perth. The parties themselves could not have construed the agreement as limiting the arbitrator to the specific period of his first stay at Perth for making his award, because both of them, by a mutual understanding, appeared before him to advocate their respective interests at the quarter sessions next succeeding the term in which the judge first went to Perth. The arbitrator in the interim went to Brockville, where he resided. I think the time of making and publishing the award was left to the discretion of the arbitrator, and it was open to either of the parties to request the arbitrator to proceed in a reasonable time; and if after such request, the arbitrator had neglected or refused to make his award, they might have revoked his authority.—2 *Keb.* 10; 3 *M. & S.* 147. It appears, however, the arbitrator was allowed to take his own time; and he made the award without the parties raising any objection to the delay. Under such circumstances, I think the objection untenable.

6. There was no proof given at the trial that the expenses of the arbitration were included in the taxed bill of costs, except what the *allocatur* itself contains, which is in the following words: "The costs taxed for the defendants, on "being referred to arbitration, amount to 32*l.* 13*s.*" Now it is quite impossible for me to say, that the costs of the arbitration appear by this document to have been included in the taxed bill of costs. I incline, however, to think it very probable, from the allusion to the arbitration, that the

whole or a part of the costs of that proceeding are embraced in the gross sum stated in the *allocatur*. If that were the fact, it amounts to no answer to the right of action, but should have been received in mitigation of damages only. If, upon inspection of the taxed bill of costs, it should be found that more has been allowed than the costs of the suit, I have no objection that the verdict be reduced to that amount. The cases in the margin (I T. R. 138; 5 Taunt. 454), shew that when the terms of the rule direct the costs to abide the event, they mean the legal event; and the losing party is liable to pay such costs only as he must have paid had the cause pursued its ordinary course, and a verdict had passed against him.

MACAULAY, J., gave no opinion.

Per Cur.—Postea to the Plaintiff.

NICHOLSON EX. DEM. SPAFFORD V. REA.

The admissions of a plaintiff in ejectment, being a real person (the lessor being an infant), are not evidence to prevent the recovery of the premises.

Ejectment for premises in the Midland District. The lessor of the plaintiff was an infant, and the plaintiff was married to the lessor's mother, who was then a widow, about ten months before this action was brought. The action was brought by the lessor of the plaintiff as heir-at-law to the last owner and occupant, and that title was clearly proved. For the defence a receipt, dated 24th Dec., 1831, was put in, which purported to be given by the plaintiff and his wife, the mother of the lessor. Nicholson's signature thereto was proved, but not his wife's. It was for payment of £. 15s., six months' rent of the premises in question, to Nicholson; and the defendant's counsel insisted that such receipt of rent by the plaintiff was presumptive evidence of a holding from year to year by the defendant, and entitled him to six months' notice to quit; and that all the acts and admissions were evidence in this case against him, as in ordinary cases. Verdict for plaintiff; and in Michaelmas term *Draper* obtained a rule nisi for a new trial.

Bidwell, for the plaintiff, argued that the admissions were no evidence to defeat the heir-at-law, not even if he were

his guardian ; and that in the action of ejectment, forms shall give way to meet the justice of the case.—2 Burr. 623 ; 1 R. & M. 106 ; 2 Stark. Cas. 366.

Draper, for defendant, contended that the plaintiff being an actual person, not a fictitious one, and being introduced on the record for a substantial purpose, not as a mere fiction, the same consequence must result as in any other case.—4 M. & S. 300 ; Holt, 267 ; 1 Salk. 260 ; Str. 1056, 694, 932, 899, 531 ; 1 Wils. 130 ; Cowp. 128 ; 2 Burr. 667 ; 3 Mod. 258 ; Doug. 407, n ; 2 Brown, 128 ; 2 Chit. T. 323 ; Burr. 1290 ; 7 T. R. 663, 670 (n.) ; 1 B. & P. 447.

THE COURT held that the plaintiff in ejectment is regarded as a fictitious person as respects admissions adverse to the interests of his lessor ; and in case of an infant lessor, a real plaintiff is introduced, to prevent the necessity of an application for security for costs. The admissions of the *prochein ami* or guardian of an infant, though a party to the suit and liable to costs, are not admissible ; and upon similar principles, independently of the prevailing practice in ejectment, the admissions of the plaintiff of an infant lessor should be rejected.

Note.—An affidavit purporting to be sworn by two persons, was offered by the plaintiff's counsel, but the jurat not stating distinctly that both deponents had been sworn, the court would not allow it to be read.

Per Cur.—Rule discharged.

SHELDON V. LAW.

A. betted B. 75*l.* to 50*l.* upon a horse-race, and deposited the money in the hands of C., a stakeholder. They did not own either of the horses which were to run, nor was there any other match or stake for which the horses were to run. A. lost ; and disputing it, gave C. notice not to pay over the money to B., but C. did so. *Held*, that A. could recover back his deposit from C. in an action for money had and received, upon the ground that the wager was illegal, being contrary to the statute 13 Geo. II. ch. 19.

Assumpsit for money had and received.

The plaintiff made a wager with another person, upon a race to be run between two horses, owned by other persons —betting 75*l.* to 50*l.*—and the stakes were deposited in the defendant's hands. It did not appear that any match had been or was made between the owners of the horses, or that

any other wagers were laid than this one ; but it seemed that this bet (neither of the parties to which were owners of the horses) constituted the only match or stakes to be run for. The horse against which the plaintiff betted was by the stewards or judges of the race adjudged to be the winner ; and the defendant paid the stakes over to the other party accordingly, after notice from the plaintiff not to do so. This action was brought to recover, first, the amount of the stakes, the plaintiff contending that he had won the race ; and, secondly, if not, then the amount of his deposit, as being an illegal wager. The right to adopt such alternative was rested upon 8 B. & C. 221, 6 D. & R. 26, and was not disputed. It appearing at the trial that it had been mutually agreed previous to the race to appoint judges between the parties, and such judges having been nominated to preside at the race, and having decided the plaintiff to have lost. Macaulay, J., before whom the cause was tried, said that the fairness of the race, or the question of who won or lost, could not be considered as put in issue, the parties being concluded by the determination of their own referees. Upon this the plaintiff elected to proceed for his deposit as being an illegal and void bet, and the question arose whether such was the case. The plaintiff was nonsuited, with leave to move to enter a verdict for 75*l.* in his favour, if the Court should be of opinion that he ought to recover.

And in Michaelmas Term a motion was accordingly made by *Baldwin* for the plaintiff, to which *Draper* shewed cause. The case stood over for consideration, and judgment was this day given.

ROBINSON, C. J.—For all that appears, this is simply a bye bet upon a horse race between two persons not owning the horses, and the question is, whether it is legal. If it is not, then clearly the plaintiff is entitled to recover of the defendant upon the count for money had and received, because it appears that the defendant paid over the money after notice forbidding him to do so ; and that under these circumstances assumpsit is sustainable if the wager is illegal, is held in numerous authorities. As to the legality of this wager, the 16 Car. II. c. 7, s. 2, clearly prohibits, under a heavy penalty, winning any sum of money by horse races or

by "betting on those who ride." The 9th Anne, c. 14, s. 5, prohibits the betting on the side of any one playing "at any game or games whatsoever," which (although if we adhered to the ordinary meaning of the words used, we might reasonably think otherwise) have been in many cases held decidedly to extend to horse races. The stat. 13 Geo. II. c. 19, and 18 Geo. II. c. 34, were passed rather with a view of encouraging a good breed of horses by allowing horse races under certain restrictions, and it is certain, that this race does not come within the description of races which by these statutes are made lawful. It was not proved that the horses ran upon a match made for anything, and it was proved that they were not the property of the persons betting. The wager stands, therefore, before us as a bye-bet. *Prima facie* every wager upon a horse-race is illegal; and if anything had taken place here that did or could render this wager an exception, it should have been shewn, in order to relieve against the imputation of illegality, which under the earlier statutes cited, lies against all horse-racing.

I cannot say but I think that the statutes 13 & 18 Geo. II. are rather confused; and the decisions under the statute of Anne, under which we are bound to hold it includes horse-races, seem not very easily reconciled to the language of the prohibitions, unless the words are to receive a very liberal construction. They seem, too, not to be consistent with the apparent understanding of the legislature, when they passed the 13th Geo. II. ch. 19. However, since that act, it is very clear that betting on a horse-race, if the horses ran only for that wager, and were not the property of the persons betting, is an illegal wager; and by the decisions upon the statute of Anne, if this is to be looked upon as a bye-bet, and not as the only occasion of the race, it would be nevertheless illegal.

The judgment is in favour of the plaintiff, upon his right to recover back his deposit. I can see no pretence for contending that the statutes referred to are not in force here.

SHERWOOD, J.—I think the match or race which was made up and run by the parties, who were not the owners of the horses or either of them, was contrary to the stat. 13 Geo. II., and therefore the wager between the parties was wholly void

by 9 Anne, although the bet on each side was above 30*l.*, and the whole amount of both exceeded 50*l.* sterling. The sums betted on both sides to make up a race or match are allowed to be added together to complete the sum required by the statute to make the race legal.—Burr. 2432.

It appears the plaintiff requested the defendant not to pay over the money deposited with him, before he did pay it; and therefore he is liable to this action for money had and received.—8 B. & C. 221; 7 Bing. 405.

MACAULAY, J.—Upon a comparison of the facts of this case with the decisions upon the statutes 16 Car. 2, chap. 7; 9 Anne, chap. 14; 13 Geo. II. chap. 19, and 18 Geo. II. chap. 34, it appears to me, the plaintiff is entitled to recover his deposit, upon the ground that the wager was illegal.

1. If it was a *wager* on a horse-race, and not a *match*, it was void, because there was no match for 50*l.*; and the race being consequently illegal, all bets thereon were void.

2. If the bet in question constituted the match, then it was void because the parties did not own the horses, and it was in direct contravention of the 13th Geo. II.

3. If not the *match*, but a *wager* upon a *match*, it would seem void, as exceeding 10*l.*, under 9 Anne, ch. 14, although at common law all wagers were legal.

The acts contemplate *bona fide* horse-racing upon a regularly appointed or established course. And as against a stakeholder paying over the deposit upon an illegal wager after notice, assumpsit for money had and received lies, and the action need not be founded upon the statute of Anne.—4 T. R. 1; 2 H. Bl. 43; 3 Camp. 140; 1 Bing. 1; 7 Moor. 112; Cow. 729, 282; 4 Camp. 152; 2 Bl. Rep. 706; 2 Wils. 267, 309; 2 Camp. 430; 6 T. R. 499; 2 B. & P. 51; 2 Str. 1159; 3 T. R. 693; 3 Camp. 168; 1 Esp. 235; 2 Camp. 438; 1 M. & S. 500; 2 Wils. 36; 2 H. Bl. 308; 6 D. & R. 26.

Per Cur.—Let the verdict be entered in favour of the plaintiff for the amount of his deposit.

BAKER ET AL. V. FLINT.

Where stone was tortiously removed and severed from the freehold, and cut and shaped into mill stones : *Held*, that the person who had so taken and worked them could not sustain trespass against the owner of the land from whence they were taken, who had got them into his possession by directing the carriers of them to deliver them on his premises, as the property had not been changed by the work done to the stone.

Trespass *vi et armis*.

At the trial at the last assizes for the Johnstown District, *coram Sherwood, J.*, the following facts appeared in evidence : A block or blocks of stone had been tortiously removed from a rock on the defendant's land by the plaintiffs, and by them worked and cut into a pair of millstones. While in this state some persons were carrying them on sleighs through Brockville, where the defendant resided, when defendant met them and said they had the alternative to carry them to his premises and leave them there, or to be sued by him for taking them away. They choose the former, and the stones thus came into the defendant's possession ; and the plaintiffs thereupon brought this action. It was thrown out, though not distinctly proved, that the stones, before the commencement of the suit, had been sold to one Bell. The drivers of the sleighs who carried these stones to defendant's premises, were not called as witnesses ; but the case for the plaintiffs was principally made out by evidence of admissions made by the defendant at different times. The jury found in favour of the plaintiffs, and last term *Draper* obtained a rule *nisi* to set aside the verdict and grant a new trial, the verdict being contrary to law and evidence and the judge's charge.

Sullivan showed cause, and contended that the property of the defendant in the stone was so changed by its being severed from its freehold and worked into millstones, that he could not reclaim it ; and that in equity, as he had the stones with the value of the plaintiffs' work on them, delivered on his premises, he need not complain of a verdict which only made him pay for them.

Draper relied on the case of *Mittleberger v. By*, as governing this in principle.

THE COURT gave judgment this term in favour of the defendant's application. The stones, when severed from

the freehold, remained in the defendants possession as chattels upon his premises, and their being afterwards shaped into millstones, worked no change of property; consequently, when he directed them to be taken to his yard, as proved in evidence (which, combined with their subsequent removal and deposit there with his assent, constituted the alleged trespass), they continued to constitute his chattles, and he was privileged in law in disposing of them in the way proved.—
2 Bl. Com. 404; Moor. 20; Poph. 38; Year Book, 5 Hen. VII. 15, and 12 Hen. VIII. 10; 2 Cam. N. P. 576: 1 Taunt, 241.

Per. Cur.—Rule absolute.

IN THE KING'S BENCH.

EASTER TERM, 3 WILLIAM IV.

Present,—THE HON. CHIEF JUSTICE ROBINSON.
 “ Mr. JUSTICE SHERWOOD.
 “ Mr. JUSTICE MACAULAY.

DOE DEM SPAFFORD V. BROWN AND BROWN.

In ejectment by a purchaser of lands sold under an execution, the sheriff's deed is *prima facie* evidence that the writ was delivered to the sheriff and the lands seized and sold under it.

Ejectment for lands in the Johnstown district.

The lessor of the plaintiff made title as purchaser at sheriff's sale, upon an execution which had issued against the lands of one Jonah Brown, at the suit of Seth Downs; and having produced an exemplification of the judgment entered in Michaelmas term, 1818, and proved the issuing of *fi. fa.* against goods, and afterwards of a *fi. fa.* against lands, in Easter term, 11 Geo. IV. returnable the first day of Trinity Term then next, he put in evidence a deed from the sheriff to himself, dated 3rd June, 1831, reciting that the *fi. fa.* against lands was delivered to him on 15th May, 1830; under which he seized these lands in execution,

advertised them according to law, and sold them on 28th May, 1831, to the lessor of the plaintiff. The defendant took these exceptions to the plaintiff's title: 1st, that no evidence was given of delivery to the sheriff of the writ of *fi. fa.*, on which the lessor of the plaintiff contends the lands were sold; 2ndly, that no evidence was given of the lands having been seized by the sheriff; 3rdly, that no evidence was given of the actual sale of the lands by the sheriff; 4thly, that the plaintiff having declared for the entire estate in the lands in question, cannot have a verdict for an undivided moiety: and on them moved a nonsuit.

The title of Jonah Brown was only for an undivided moiety.

These objections were reserved by Sherwood, J., at the trial, and the plaintiff had a verdict.

This cause was argued in Hilary Term last, by *Draper* for the lessor of the plaintiff, and *Sullivan* for the defendant, and stood over for judgment.

ROBINSON, C. J.—We are all clearly of opinion that there is nothing in these objections. As to the first three objections, the very conveyance from the sheriff is itself *prima facie* evidence that the writ was delivered to him, that he took the land in execution and sold them. The court are not to presume that he acted colourably and fraudulently. A judgment and execution are shewn: that he received the execution is reasonably to be presumed, from his having acted under it and made an official return of what he did. In the same manner the seizure of the lands is implied in the sale, and the sale is proved by the conveyance, in which the several formalities are recited by the sheriff, under his seal, and alleged to have been duly observed. It was open to the defendant to controvert any of the facts, if the recital was mere invention; but proof of them otherwise than they were proved in this case, was not necessary, and in some cases, after a lapse of time, might be impossible, even where everything had been done with perfect regularity.

As to the 4th point, it is scarcely necessary to say, that it is not sustainable. The cases of *Doe ex dem. Burgess v. Purvis et al.*, 1 Burr. 328, and *Abbott v. Skinner*, 1 Sid. 229, are express authorities against it. The defendants not

having prevailed at the trial upon any of these exceptions against the plaintiff's title, advanced a title in themselves under a judgment at their suit against the same Jonah Brown in 1818, being subsequent to the judgment under which the plaintiff claimed ; but independently of any exceptions that might have been taken to this title upon other grounds, it was impeached by the lessor of the plaintiff on the ground that this second judgment was fraudulent and collusive, and made for the express purpose of defeating creditors. The evidence to that effect was so strong and convincing, that there could be no room for doubt. The case was, however, left to the jury upon the evidence, and they found this second judgment to be fraudulent without hesitation. It would have been surprising, indeed, if they had come to any other conclusion ; for the contrivance between the debtor Jonah Brown and the present defendants, who were his sons, and one or both of them under age, to set up a debt of upwards of 600*l.*, for which they could shew no plausible foundation, was too shallow to impose upon the understanding of any one.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Postea to the plaintiff.

DOE EX DEM. SPAFFORD V. JAMES BROWN.

It is irregular to issue a *fieri facias* against lands, until after the return of the execution against goods ; but as it is only an irregularity, a purchaser at sheriff's sale under the writ against lands cannot be affected by it.

Ejectment for premises in the district of Johnstown. The lessor of the plaintiff claimed under a deed from the sheriff of that district, who sold by virtue of a *fi. fa.* founded on the judgment mentioned in the preceding case. In this case, the exemplification of the judgment was produced. It appeared by the entry on the roll, that a *fi. fa.* against the goods and chattels of Jonah Brown issued in Michaelmas term, 1818, directed to the sheriff of the district of Johnstown, and returnable on the last day of Hilary term then next ensuing, on which day the sheriff returned *nulla bona*. On the last day of Hilary term, 1819, being the return day of the *fi. fa.* against the goods, a *fi. fa.* against the lands and tenements was sued out, returnable on the first day of Hilary

term, 1820, upon which writ a part of the debt was levied. On the last mentioned day, a *ca. sa.* issued against Jonah Brown, returnable on the first day of Michaelmas Term, 1820. Afterwards (in Easter term, 1830), an other writ of *fi. fa.* against lands was issued, returnable on the first day of Trinity term then next following; on which the sheriff returned, that he had caused to be made of the lands and tenements of Jonah Brown in his district the sum of 200*l.* A deed of bargain and sale, under the hand and seal of office of the sheriff of the district of Johnstown, to the lessor of the plaintiff, his heirs and assigns for ever, dated the 13th day of June, 1831, and registered on the 4th September, 1832, was also filed; in which the sheriff recites that he received the writ of *fi. fa.* against the lands of Jonah Brown, on the 16th May, 1830, and by virtue of that writ seized into his hands and took in execution the premises in question, and caused them to be advertised according to law, to be sold and adjudged to the highest bidder on the 21st May, 1831; that the lessor of the plaintiff was the highest bidder on that day, and became the purchaser for 200*l.* the receipt of which the sheriff acknowledges in his deed. It was admitted at the trial, that one John Chatterton was the grantee of the crown of the lands, and that it was proved that he died about six or seven years ago, and that he duly executed a deed of bargain and sale of the lands to Jonah Brown on the 20th Nov. 1815, in which he acknowledged a consideration of 100*l.* This deed was registered in the register office of the county of Leeds on the 13th Sept. 1832, nearly seventeen years after its date, and some time after the commencement of this action. On the part of the defendant, a deed of bargain and sale in fee, from Jonah Brown to his son (the defendant) dated the 30th Nov. 1816, was proved by Alfred Brown, a subscribing witness, to have been executed by his father. The witness could not say in what year it was executed, or whether any consideration was given for it. Another deed of bargain and sale in fee from Samuel D. Chatterton of the same lands, dated the 31st of March, 1830, and registered the 28th of April, 1831, was proved by Barna Brown, a subscribing witness and a brother of the defendant. The consideration mentioned in the last deed was 100*l.*, but the

defendant in fact never paid any part of it. Barna Brown, the attesting witness, gave his own note to Samuel D. Chatterton for 2*l.* 10*s.*, payable in boards and wheat, which was afterwards paid. Samuel D. Chatterton was the eldest son and heir-at-law of the late John Chatterton, the grantee of the crown, who died intestate. Sherwood, J., who tried the cause, charged the jury that the deed from John Chatterton to Jonah Brown vested the legal estate in the latter from the delivery, although not registered for years afterwards ; that he inclined to think the deed from Jonah Brown wholly inoperative, and conveying no estate whatever to him ; and that the deed from Samuel D. Chatterton to the defendant was equally ineffectual; The jury found for the lessor of the plaintiff, subject to certain points reserved, and with leave to enter a nonsuit, in case the court should think the objections tenable. 1. No evidence was given of the delivery of the writ of *fi. fa.*, to the sheriff, on which the lessor of the plaintiff contends the lands in question were sold. 2. No evidence of the lands in question having been seized by the sheriff. 3. No sufficient evidence of the sale (if any) by the sheriff. 4. The sale of the lands (if any) void, having been on an *alias fi. fa.* following an original *fi. fa.* against lands, which had been issued before the return day of the *fi. fa.* against goods. 5 The lands in question did not pass to the lessor of the plaintiff by the sheriff's deed, as it only purports to convey as much of the lands in question as in the sheriff was by virtue of the writ of *fi. fa.*, when in fact and in law nothing was in the sheriff, as the deed from John Chatterton to Jonah Brown was not registered till the 13th Sept. 1832, (after action brought.) 6th. No evidence that the fee simple of the lands, or any lesser interest, was in the lessor of the plaintiff on the day of the demise laid in the declaration.

This case was argued by *Draper* for the lessor of the plaintiff, and *Sullivan* for the defendant, in Hilary Term, and this day judgment was given.

ROBINSON, C. J.—The Court see no reason to differ from the conclusion came to by the jury, to whom was left the question of fraud, as regarded the deed given by Jonah Crown, and dated Nov. 1817, and also the deed from Samuel Chatterton to James Brown.

It remains, therefore, to consider whether there is anything in the additional exceptions raised in this case to the plaintiff's title. Those exceptions, which are common to both these cases, have been already disposed of. In respect to the 4th exception, the court are of opinion in this case, as they have had occasion to express in a former case where the exception was raised, that under our provincial statute, a *fi. fa.* against lands cannot regularly be issued until on or after the return day of the *fi. fa.* against goods. We do not think that the statute is complied with by taking out a writ against goods, and obtaining an immediate return of *nulla bona*, and issuing thereupon without delay a writ against the lands, which would have no effect in giving time to the defendant, which the statute evidently intends, and which would subject the real estate to sale, notwithstanding the debtor might have goods to answer before the return day of the *fi. fa.* under which they might be seized and sold.

But we look upon this as an irregularity, for which the defendant might and ought to have moved to set aside the execution against the lands. He had ample time for that purpose, and by not having done so, must be taken to have acquiesced and to have waved the irregularity. The title of a purchaser at sheriff's sale cannot, we think, be affected by it, inasmuch as the sale was made upon an execution not void upon the face of it, and issued upon a judgment valid and unsatisfied. The purchaser at sheriff's sale being in this case the assignee of the judgment, does not, in our opinion, entitle the defendant to raise the exception in this stage and after such a lapse of time. It is further to be observed here that these lands were not sold under a *fi. fa.* issued too soon but under an *alias fi. fa.* against lands, issued long after the return day of the writ against the goods; so that in effect the defendant has had all the protection and advantage which our statute 43 Geo. III chap. 1, intended.

The 5th and 6th exceptions turn upon the same point, and are founded upon the assumption, that when a bargain and sale in this province is registered, such registry, although it is made to supply the place of enrolment by our statute 37 Geo. III. chap. 8, cannot apply retrospectively so as to make the conveyance valid and effectual from the time of the exe-

cution, but has effect only to make it a valid conveyance from the time of its being registered. This is by no means a new question. It has been many years ago expressly adjudged, and in many cases it has presented itself to the view of the courts, and the operation of registry retrospectively has been recognized as a point settled and generally understood by the profession and by the court. A very great number of titles, doubtless, must now depend upon the upholding of this principle: the greatest injury and inconvenience would result from unsettling it; while none, that I am aware of, has followed from its resting upon its present footing. In a matter of this kind, we should feel it necessary to adhere to the uniform course of former decisions, so long as they are not overruled by higher authority, even although we could not clearly discern the principle on which those decisions were founded; but we see no reason to dissent from them. On the contrary, they seem to be supported by the most satisfactory authority; and, without going into the question as if it were a perfectly open question, upon the construction of the words of our statute, and upon applying the analogy of the early decisions upon the Statute of Enrolments, it is sufficient to advert to the case of Vaughan ex dem. Atkins v. Atkins, 5 Burr. 2787, in which the court thus express themselves: "There is no rule better 'founded in law, reason and convenience, than this, that all 'the several parts and ceremonies necessary to complete a 'conveyance shall be *taken together as one act*, and operate 'from the *substantial part by relation*.'" Livery relates to the seoffment—enrolment, to the bargain and sale—a recovery, to the deed which leads the use; so admittance shall relate to the surrender (in a copyhold case), especially when it is a sale "for a valuable consideration." I think the postea should be delivered to the lessor of the plaintiff.

SHERWOOD, J. (after stating the case).—As to the 1st point, the judgment roll in the case of Dewns v. Jonah Brown proves, that an *alias* writ of *fi. fa.*, directed to the sheriff of the district of Johnston, issued on the 1st of May, 1830; and the deed of the sheriff, under his hand and seal of office to the lessor of the plaintiff, recites the writ, and that the sheriff received it on the 15th of the same month of May.

The deed further recites, that the sheriff seized and took in execution the lands in question by virtue of the writ, and caused them to be advertised and published according to law, to be sold to the highest bidder, on the 21st of May, 1831; and that he accordingly sold the premises on that day to the lessor of the plaintiff, for 200*l.*, he being the highest bidder at the sale. After a sale of lands by the sheriff, under a writ of *fi. fa.*, it is his duty to effect a valid title to the purchaser of all the right and interest which he as sheriff has in the premises; and this, in my opinion, he cannot do, but through the medium of a conveyance by deed. In the case of Doe Stevens v. Douston, 1 B. & A. 230, the lessor of the plaintiff claimed as assignee of the sheriff of the county of Middlesex, who seized a lease for years under a *fi. fa.* against goods and chattels, and sold the term, and the court of King's Bench were of opinion that it was the duty of the sheriff to give a conveyance of the premises to the vendee. I think lands are by law sold in this province for the satisfaction of judgment debts, precisely as terms for years are sold in England for the same purpose; and therefore I think it was the duty of the sheriff to give a deed of conveyance to the lessor of the plaintiff, in the same way that the sheriff in England would do on the sale of a term. The sheriff was consequently acting as a public officer, in the regular and necessary execution of his duty, when he gave the deed of conveyance of the premises to the lessor of the plaintiff, and the principle of *omnia rite acta* applies to him, as it does to all public officers in the legal execution of their public duty; and the presumption of law is, that he was fully authorized to give the conveyance. Now it is very clear the sheriff had no authority to sell or convey the lands, unless the writ of *fi. fa.* had been delivered to him before the return-day mentioned in the process; and therefore the legal presumption is, that it was delivered to him before that day. This presumption was of course liable to be destroyed by evidence on the part of the defendant, shewing that in fact the *fi. fa.* was delivered to the sheriff after the return-day, or that it never was delivered to him at all; but no such testimony was given, and therefore the presumption stands, and is a sufficient answer, in my opinion, to the first objection; and I think the cases

of *Rex v. Jones*, 2 Camp. 131, and *Rex v. Verelst*, 3 Camp. 432, sustain the position in principle. Independently, however, of the legal presumption, I think there is evidence in this case of the delivery of the writ of *fi. fa.* to the sheriff. He recites in the deed to the lessor of the plaintiff, that the writ was delivered to him to be executed, on the 15th of May, 1830, which was more than ten months before the return-day of the writ. As the deed is an official act of the sheriff, under his hand and seal of office, and as it was a part of his duty, under the authority of the writ, to execute a conveyance to the lessor of the plaintiff, the purchaser of the lands at public sale, I think the recital in the conveyance, of the delivery of the writ to him, is *prima facie* evidence of that fact, according to the principle of several cases.—Temp. H. 112; 2 Salk. 586; 4 Burr. 2129; 11 East. 297; 2 Camp. 117. I think the recital is presumptive evidence, upon the ground that faith is to be given to the official act of a public officer like the sheriff, even when third persons are concerned. In 11 Ea. 297, it appears there were two writs of *fi. fa.* and a separate return annexed to each writ. It does not appear, however, that the writs of *fi. fa.* in the last cited case were ever returned into the office. The written returns of the sheriff, annexed to the writs, stated several special facts, amounting to an agreement between the parties to a former suit, and important to the defence of the action. The counsel for the plaintiff strenuously opposed the admission of the evidence, and contended, that as the plaintiff was no party to the return which was made by the sheriff without his knowledge, he could not be affected by it. At the trial, Lord Ellenborough said : “I am “of opinion, it is incumbent on the plaintiff to contradict the “facts stated in the returns. Faith is given to what the “sheriff states in this manner, even where third parties are “concerned. If he returns a rescue, an attachment issues “in the first instance. I consider it, however, as only *prima facie* evidence. Upon an indictment for a rescue, it would “be open to the defendant to shew that the return was false. “Here you are at liberty to contradict any fact stated in the “returns to these writs, but if you do not, I must presume “that there was an agreement of the nature stated between

"the parties." The court above afterwards concurred in the opinion of the chief justice at the trial. In the present case, the sheriff, in his conveyance to the vendee under the writ of *fi. fa.*, recites the day he received the execution; that he seized the lands by virtue of the writ, and sold them to the lessee of the plaintiff, for 200*l.*, and that he was the highest bidder at public sale. Now all these acts were essentially necessary to the completion of the purchaser's title, and indispensably requisite to be done by the sheriff, and consequently formed a part of the *res necessarie gestæ* of a public officer in the regular execution of a public duty. A purchaser, in my opinion, has a right to be informed of the manner in which the sheriff has executed the writ of *fi. fa.*, before he pays the price of the land; and how can he be informed without a statement of what has been done, and who can properly make a statement of facts but the sheriff? He is necessarily cognizant of all the facts, and most probably he is exclusively so, and it is his duty to shew the vendee that everything required by law to complete the title has been done by him. I think the conveyance very properly contains the information, and at the same time furnishes the purchaser with evidence against the sheriff, in case the facts are incorrectly stated, to the damage of the buyer. The recital of these facts by the sheriff is *prima facie* evidence of their existence, and always open to explanation or contradiction by an interested party.

Second objection, and third. These objections, I think, are answered by the remarks on the first objection.

Fourth objection. The exemplification of the judgment in the case of *Downs v. Brown*, which I mentioned before, was produced in evidence at the trial, and shews that the first writ of *fi. fa.* against the lands issued on the day the writ against the goods was returnable, that is to say, on the last day of Hilary Term, 1819; and I incline to think the court ought not to look any further into the proceedings. When the court find the first writ of *fi. fa.* against lands regularly issued, according to the entry on the roll, they will not inspect the writ itself to ascertain with precision when in point of fact it issued. In England, if the defendant have no property in the county where the venue is laid, a *testatum*

fi. fa. may issue into another county, and this writ presupposes the issuing of a former writ into the first county; and in strictness, such writ should be sued out and returned by the sheriff, before the *testatum* can regularly be issued; but it is the constant practice to issue the *testatum* in the first instance, which saves delay and expense. If the regularity of the proceeding be afterwards called in question, it will then be time enough to issue a writ to warrant the *testatum*, and get it returned and entered on the roll; which being brought into court, and the entries appearing correct, the court will examine no further.—5 T. R. 272; 6 T. R. 450. I think the same principle must govern this case. The entries on the roll show the proceedings are correct; the execution against the lands has been executed without objection—the conveyance from the sheriff has been duly registered. If it clearly appeared, by the entry on the roll, that the first writ of execution against the lands did in point of fact issue before the return day of the writ of *fi. fa.* against the goods, I should still hold the writ of *fi. fa.* was not null and void. The provincial statute, 43 Geo. III., c. 1, does not take away the right of the plaintiff to sue out execution against the lands, which the statute, 5 Geo. II. ch. 7, gives him, but merely directs that goods and chattels shall not be included in the same writ of execution, and that no such process shall issue against the lands until the return of the writ against the goods. The writ, upon the face of it, is perfectly correct, as to its form, *teste* and return, and was a legal authority to the sheriff to sell the land, and as I think is not voidable (2 Salk. 674, 675; 4 Camp. 58); but suppose it were voidable, its invalidity, in my opinion, could not be taken advantage of in a collateral action like the present. I think in such case it could only be avoided by writ of error, or by application to the court to set it aside.

Fifth objection. This objection involves an important question, relative to the effect of the registering of deeds of bargain and sale; whether it has a retrospective effect to the delivery of the deed, or only a prospective one from the time of registry? If the fee simple of the land did not vest in Jonah Brown from the execution of the deed from John Chatterton to him, then the lessor of the plaintiff had no

title at the time of the demise laid in the declaration, and this action is unsustained by any legal evidence of title, because the deed was registered after the record had been sent down to trial.

By the common law, the owner of lands in fee might sell them for a pecuniary consideration without a deed, and after receiving the consideration, the vendor became seised to the use of the vendee, who might avail himself of the advantage of the purchase in a court of equity, in the event of the vendor refusing to adhere to the contract. These sales became so frequent, notwithstanding their attendant inconveniences, that the English parliament was induced to pass the Statute of Uses, 27 H. VIII. c. 10, which had the effect immediately to transfer the possession and the legal estate to the purchaser, without any entry or other act on his part. The objection to this law was, that secret conveyances of land might legally be effected under it, thereby opening a door for fraud, to remedy which the legislature enacted the Statute of Enrolments, 27 Hen. VIII. ch. 16, which directs, that bargains and sales of lands shall thereafter be made by writing indented and sealed, and that such deed shall be enrolled in a court of record within six months next after its date, or in default of such act shall be wholly void. This law was in force in this province, but its operation has been suspended by our Register Act, 35 Geo. III. ch. 3, in conjunction with another provincial statute (37 Geo. III. ch. 8), made *in pari materia*, the joint provisions of which are equipollent in this province to the enactment of the Statute of Enrolments in England, and were intended to be similar in their legal effect, with this difference, that the deed of bargain and sale must be enrolled in England within six months from the date, but may be registered here at any time after the date, and be equally efficacious and valid. The latter act, after reciting that "in certain cases, lands have been intended "to have been conveyed by deed of bargain and sale, and "whereas such deeds of bargain and sale, not having been "enrolled in a court of record, are not valid in law; in order "therefore to prevent the injury that might hence arise to "his Majesty's subjects in this province, and for the better "regulating the conveyance of land in future," it is enacted,

"that whenever any lands have been sold, or shall hereafter be sold, under deed of bargain and sale, and such deed of bargain and sale hath been or *shall hereafter be* duly registered in the registry office of the county in which such lands are situate, agreeably to the provisions, &c.," of the Registry Act, "*the same shall be, and is hereby declared to be, a good and valid conveyance in law.*" The whole scope and tenor of the context of these acts clearly evince, that the legislature intended to substitute the registry of deeds of bargain and sale in this province, for the enrolment by the English statute; and therefore the decisions in England shewing the time to which the enrolment relates, are applicable to the same subject here, under our Registry Act. In England, the enrolment, if made within six months, relates to the date of the deed, and passes the estate *ab initio*; and in case of the death of the bargainer before enrolment, the estate vests in his heirs; therefore between the date of the deed and the enrolment, the bargainer is adjudged to be seized; and if he sell the land before enrolment, and his deed be afterwards enrolled, the sale is good.—2 Inst. 674, 675; Cro. Car. 217, 569; 4 Lev. 4; Cro. Jac. 52; Ventr. 360. I am aware that some cases have been decided the other way, but the current of authorities is certainly in favour of this doctrine. The subject is well treated in Shepherd's Touchstone, under the head of bargain and sale; and after citing numerous cases, the learned author concludes with this remark: "The distinction deducible from the authorities is, "that the estate passes immediately by the bargain and sale, "so as to enable the bargainer to grant, convey, bargain, "sell and make a good tenant to a writ of entry for a recovery; "but the estate is subject to this condition or qualification, "that unless the bargain and sale shall be enrolled in due "time, the title will be in the same state as if no bargain and "sale had been made, and therefore all intermediate acts pro- "ceeding from the bargainer will be void." If the deed of bargain and sale, in this province, should be lost or destroyed without being registered, the bargainer must lose the land; but if the witnesses die before the deed is registered, the purchaser is allowed, by the 58 Geo. III. ch. 8, to prove the execution of the deed and memorial, by other witnesses,

before the justices in quarter sessions assembled, at any time.

I am of opinion, therefore, that Jonah Brown must be adjudged to have been seized in fee of the lands in question, from the date of the deed of bargain and sale from John Chatterton to him, notwithstanding that ~~deed~~ was not registered for more than sixteen years afterwards. I am also of opinion the sheriff had a legal right to sell the land on the judgment against Jonah Brown, and that the estate in fee vested in the lessor of the plaintiff by virtue of such sale, in consequence of the subsequent registry of the deed from John Chatterton, before mentioned. The sixth objection is substantially included in the fifth, and therefore requires no particular comment. I think the *postea* should be given to the lessor of the plaintiff.—1 B. & A. 230; 2 B. & B. 362; 5 Moore, 79; 1 Taylor U. C. Rep.—, Moffat v. Hall; 1 Esp. 360; Taylor U. C. Rep. 146, 376; 5 Rep. 1; Hob. 140; Cro. Car. 110, 408; 4 Cruise, 131; 1 Sal. 136, 199; Cro. Jac. 246; 2 Ea. 404; 3 Preston Abr. 96; 5 Burr. 2787; Ventr. 360, 361; Jones, 196; Carth. 158, 178; 3 Ea. 410; 12 Mod. 3; 2 M. & S. 446; Dyer. 248; 2 Show. 158, (n.)206; Sal. 409; 1 Ld. Ray. 733; 5 Burr. 2632; 5 Esp. 91; 1 M. & S. 425; 6 M. & S. 110; 2 Stark N. P. C. 199.

MACAULAY, J., concurred.

Per Cur.—Postea to the lessor of the plaintiff.

THE KING V. SANDERSON.

An indictment for obstructing a highway, laid out under 50 Geo. III. ch. 1, cannot be supported, when the highway has not been established in the manner marked out by that statute, as when the report to the magistrates in quarter sessions by the surveyor of roads, does not express the exact width of the road, nor the precise line in which it is to run; and *semel*, in such a case, all the steps necessary to be taken, before a highway can be legally established under that act, should be proved by the prosecutor to have been taken before the defendant can be found guilty.

Indictment for a nuisance in obstructing a public highway. Plea, not guilty. The indictment had been removed from the quarter sessions by *certiorari*, and was tried at *nisi prius*, at the last assizes for the Home District. The obstruction of a road in the Gore of Toronto, that had been used as a public highway for several years, was proved against the

defendant. It did not seem, indeed, that he intended to deny it; but after the evidence had been gone through, it was contended on his part, that the road obstructed by him was not a public highway legally established, but was parcel of his own freehold, over which no legal right of way existed, and which he had therefore a right to do with as he pleased. It was not an original public allowance for road. But on the part of the prosecution it was attempted to be shewn, that such proceedings had taken place under the Highway Act of 1810, as were legal and effectual for laying out a new road leading over the *locus in quo*, and that the new highway, thus legally established, had been wrongfully obstructed by the defendant. The prosecutor produced the records or entries of the justices of the Home District in general quarter sessions, of roads laid out under the statute of 1810, ch. 1, and proved them by the clerk of the peace, who delivered in certain original documents relating to the road in question, all of which, he says, form part of the public papers of his office, part of them having been handed over to him on his accession to the office, and part received by himself as clerk of the peace. These documents were—1st, a paper signed by Richard Bristol, road surveyor, without date and without any mark, being filed in the clerk of the peace's office, addressed to the "*magistrates assembled at the quarter sessions of the peace,*" and stating, that at the request of John McVean and others, of the townships of Etobicoke, Toronto, Chinguacousy, &c., he had explored a line designed for the site of a road of communication from the new settlement made to the west of Yonge Street and north of Dundas Street, and had made a plan representing the local circumstances of the farms and improvements near the road in question, together with the situation of those townships the said road is intended to pass through, compared and more fully enlarged with and from the original surveys from the surveyor-general's office, in order to enable the justices to judge of those circumstances with more certainty. He proceeded then to state: "The line which I have adopted for the said new "road, I have marked with the letters A. B. C., &c., in the "plan above mentioned, but finding that said line intersects "an improvement on lot Nos. 25 and 26, in concession A.

"of the township of Etobicoke, the owner of which is unwilling to grant a passage to the same, I have considered it most expedient to alter the direction of the said line of road between the points E. and F., in such manner as to pass to the southward of, and avoid the before-mentioned clearing or improvement. A regular plan of the above alteration will be laid before your worship, if required." This was the whole of the report, so far as it concerned the proposed new road.

A paper was next put in, having (like the report) neither date nor any mark of time of filing or being filed. It is an application, having the signatures of forty or fifty persons to it, calling themselves freeholders of the townships of Toronto, Chinguacousy, Albion, the Gore of Toronto, and Etobicoke, and addressed to the "worshipful magistrates," not saying of what district, setting forth, "that in consideration of and for the convenience of the settlers in those remote and back townships, and also in consequence of some parts of the original allowances for road being impracticable, and to obtain a more convenient road to the town of York," a new road is necessary to be laid out, from lots Nos. 10 and 11, at the boundary line between the townships of Chinguacousy and the Gore of Toronto, to pass through the said Gore of Toronto and the township of Etobicoke unto Farr's Mill, at the Humber Creek, then to intersect the road leading to Dundas road.

It is added in this paper, "that a survey of the site for the said new road, has been caused by the signers of the application, whereof a plan and report here included." And the magistrates are prayed to take those circumstances into consideration, and to order a surveyor of roads to examine the same (if required), and to proceed accordingly, for the convenience of the subscribers. This is what is meant to be expressed in this paper, which was drawn up by some person not able to write English correctly.

A plan was next put in, which was endorsed by the late Clerk of the Peace, "Filed 11th December, 1824." It was not attached to any other paper, but on the face of it was called "Plan of a Road, from numbers 10 and 11 in the town-line of Chinguacousy to Farr's Mill, explored on demand of McVean and others, A.D. 1824, by John

"Goessman, Deputy Surveyor." It exhibited the course of a road from the limit between Nos. 10 and 11 in the town-line between Chinguacousy and the Gore of Toronto, leading to a point F. in the township of Etobicoke, not at Farr's Mills, but apparently where the new road would intersect some road then used, leading to the town of York, and leaving Farr's Mills to the right by the breadth of two lots. The plan was laid down upon a scale of forty chains to an inch. The line was marked A, B, C, D, E, F: the courses and distances from A to B—B to C, and so on, were laid down in figures in a table, concluding thus, after arriving at F, "then according to the present road to cross the Humber." At the foot of the plan was this note: "A more particular description will be furnished with a report, if required. J.G." The name of Bristol, the road surveyor who made the report, appeared nowhere on this plan, except that across the face of the plan there was written, "Confirmed in adjourned General Quarter Sessions, 11th Dec. 1824, agreeably to the report of Richard Bristol, surveyor of Roads. Alex. McDonell, Chairman." The road as laid out was designated by a double line, apparently intended to lead from the south-west angle of lot 10, in the Gore of Toronto, in such a manner as that the centre of the road would correspond with the point of the angle. It was nowhere expressed what was the breadth of the space between the two lines which mark the road. By the eye, it would seem as if intended to be a chain; but neither the eye nor actual admeasurement could pronounce with certainty whether it was intended to make it a few feet or inches more or less, the scale being forty chains to an inch. From B to C, the road coincided with or fell into the public allowance for road along a concession line. From E to F, the road preserved a straight line, not deviating in order to avoid any improvements on lots 25 or 26 in Etobicoke; but the report said the line, as drawn upon the plan, was intended to be altered.

A paper was next put in, dated November, 1830, being a petition from one Peter McVean to the magistrates, praying that the road, as confirmed by the justices in Dec. 1824, might not be altered upon any application from the present defendant. A little book of field notes was also given in,

dated June, 1830; but it was declared never to have formed a document officially in possession of the justices or the clerk of the peace, but had been lately sent to the latter under cover from the surveyor, Goessman.

The clerk of the peace read from the book in which the proceedings of the quarter sessions are recorded, the several entries relating to this road. On Dec. 3, 1824, the matter was ordered to stand over to Dec. 11; and on Dec. 11, it is entered, that Bristol's report is confirmed. On 7th May, 1831, the justices made an order quashing the order of 11th Dec. 1824, and directing that no order shall issue upon it.

Defendant was proved to have been the first occupier of lot No. 10, when the obstruction was made. The part of this new road, where it crossed that lot, had been travelled from 1824 to 1829 or 1830, when the defendant first came to occupy his lot, which before then had been an unimproved lot, and immediately stopped up the road. It was shewn further, that on those parts of this new road which run through Etobicoke, statute labour had been performed since 1824, under the laws of the province; and that the legislature, in their act passed in 1830, granting money for improving the highways, had granted 30*l.* to be expended "on the road lately laid out between Farr's Mills and lot No. 10, 6th concession east of the Centre Road, in Chinguacousy," which is the road in question, as described in evidence, and as set out in the indictment, except that in the description in the indictment there was added to this description given in the statute these words: "leading from the town-line between Chinguacousy aforesaid and the said Gore of Toronto, into, through and over a certain public king's highway, commonly called McVean's Road, and from thence to the common public highway or road leading to the Town of York, in the Home District aforesaid, by Farr's Mills aforesaid." It was stated in evidence, that this road was commonly called McVean's Road, where it runs through the Gore of Toronto: the latter part of the description, viz., leading to the town of York, by Farr's Mills, did not seem by the plan to be perfectly accurate. At the trial, the defendant contended that this had not been shewn to be a highway legally established, and his counsel raised

several objections upon the evidence. The Chief Justice, before whom the cause was tried, reserved the objections, and recommended the jury to find the defendant guilty, if they were satisfied that the road, as laid out on the plan produced, was obstructed by him ; such verdict, however, to be subject to the opinion of the court upon the sufficiency of the evidence to establish that the road in question was, at the time of the obstruction, a public highway. That it had been for some years used as such, seemed to be well made out ; but the object of the prosecution was to obtain a decision, whether this were legally a highway or no.

The *Attorney-General and Draper*, for the defendant, raised the following exceptions, which were argued in Hilary Term last.

1. That no proof is given, that an application was made by twelve freeholders to the surveyor of roads to report upon a new road, which is, under the act, to be a foundation of the whole proceeding.

2. That none of the papers produced (except the plan) from the Clerk of the Peace's office, are records—that they have no mark of having been filed in the office, but are merely shewn to be deposited there.

3. That the report of the surveyor of roads does not seem to have been confirmed in the next Court of Quarter Sessions, as the statute directs.

4. That no copy of the report describing this new road was entered of record in a book, as the statute directs.

5. That the report contains no sufficient designation of the new highway ; that it gives a mere line, and does not say on which side of the line the road is to be.

6. That the report is not conclusive as to the whole road applied for, but leaves a part uncertain and not yet determined upon or reported by the surveyor ; viz., that part from E to F, which the surveyor says he means to alter, and will report his alteration hereafter.

7. That the width of the road is not reported, but left to be conjectured ; whereas, by law, it may be any width between forty and sixty-six feet.

8. That the land over which the new road in this part of it was to be laid out was in the crown, i.e. ungranted ; and

that the statute does not authorize laying out a new road over the lands of the crown.

9. That it is not shewn that any order was ever made by the sessions to a road surveyor to open this road.

10. That in 1831 the sessions annulled their former order confirming this road.

Baldwin, for the prosecution.

ROBINSON, C. J.—These questions principally depend upon the effect and proper construction of our provincial statute 50 Geo. III. ch. 1. The British statute 13 Geo. III. ch. 78, passed for the same purpose of authorizing the laying out of new roads and stopping up the old, though it differs in its details from ours, proceeds so far on similar principles, that, among the cases which have been decided upon it, some few are more or less in point with respect to several of the objections raised here. In my opinion, this road has not been legally established. It is true, on the one side, that the public convenience is involved in the question ; from whence it may be argued, that the statute and everything done under it should receive a liberal interpretation. But, on the other hand, it trenches upon private rights of property, and the interference should go no further, nor be exercised in any other manner, than the legislature has expressly permitted. Statutes for all public works and objects of this kind, when they authorize depriving individuals of their property, are to be construed upon the principle last mentioned. Such powers as are given by this statute, should be carried into effect regularly and carefully. The protection of the subject requires it.

Several of the objections raised here are not, I think, of sufficient importance to affect the legality of the proceeding in this case, but come rather within the principle of the statute being in those respects directory. They relate to matters of form, which ought to be observed ; but the non-performance of which does not necessarily render the act void. Others of the objections are more substantial, and are in my opinion fatal. The width of the road not being stated, nor, in my judgment, apparent with certainty from an examination of the plan, and the road being only in part defined as to its course (the line from E to F being left for

further consideration by the road surveyor), are both, I think, fatal defects. The case of Davison v. Gill, 1 Ea. 74, is strong on this first point; and the principle on which the court gave their judgment applies equally, though there happens to be no form appended to this statute requiring the breadth of the road to be stated.

Upon the other points it is not necessary that I should form an opinion, since I think the road not an established highway; and I would not, therefore, say anything upon them by which I should be considered as having finally made up my mind on those points, if any of them should be relied on in a future case under this statute. At present, however, I am inclined to think the first objection is not fatal. It is not shewn that twelve freeholders did not petition the surveyor of roads: their having applied to the justices after the plan and report were perfected, does not prove that; but, on the contrary, is rather consistent with the supposition: for in that application they state that they had caused the proposed new road to be surveyed, and pray the justices to confirm it. If it were proved, indeed, that twelve freeholders did not petition, as the act directs, that might invalidate the order, by removing the very foundation of the proceeding, unless there had been an acquiescence under it; but in the absence of such evidence, the court would intend that the surveyor did not act without a petition, and that the justices did not make their order without proof of the necessary previous steps. The court will make all reasonable intendments in support of the order of the justices.

As to the second objection, I think it not tenable. The report is produced from the proper office, and it is there a public record, whether the officer has filed it or not. That point has been expressly decided in reference to a similar proceeding in England. The plan, moreover, which is in truth the body and essence of the report, is filed by the proper officer, and as of the proper time.

As to the third objection, it may admit of doubt; but I am inclined to think there is nothing in it. For all that appears, the report was made in the vacation before the sessions which followed Michaelmas term; and that session was the one in which it ought to have been tried, if opposed, or the report

confirmed, if not opposed. It does not appear that any opposition was made ; and that notice was given, we must intend was shewn to the sessions. The confirming it, when there is no opposition, is of course—the statute requires it, and leaves the justices no discretion. There seems, therefore, no good reason for looking upon the statute as otherwise than directory, in respect to this confirmation being made at the next sessions ; but, at all events, the order was not deferred to a subsequent sessions, but was made at an adjourned sitting of the same sessions, the matter being adjourned over to that sitting, as appears by the minutes read in evidence. No injury could be done, therefore, by the making the order at that time ; and I think the cases on similar provisions in statutes of this kind, would warrant this being regarded as merely directory, if there were a decided informality, but I do not see that there was. It was done at the proper sessions in an adjourned sitting, not at any special sessions.

The fourth objection, I think, is clearly immaterial.

The fifth objection is in some measure blended with the seventh. It is, I think, fatal—that the report, considering the plan, though not annexed, to be part of it, gives merely a mathematical line by courses and distances, and says neither on which side the line the road is to be, nor what is to be its width. These are very material points, which should not be left unsettled.

The eighth and ninth objections, I think, are not tenable ; and as to the tenth, it is very obvious, that if the sessions made a valid order under this statute in 1824 establishing a highway, they were done with the matter, and could not rescind their order in 1831.

It was urged by the prosecutor's counsel, that there had been a dedication, as we must presume, from the user since 1824 ; but the facts repel the presumption. We see the origin of the road. The prosecutor has endeavoured to prove that it was established by a formal proceeding compulsory under the statute, and not resting on the assent of any one ; and this defendant asserted his right as soon as he could. It was also urged, that the width not being expressed, it may be at least inferred that the least possible width (forty

feet) is intended. The statute 4 Geo. IV. ch. 10, is to be considered on this point. It does not always leave it in the power of the surveyor to report a road so narrow as forty feet, but he must make it as wide as the old road—not, however, exceeding sixty-six feet. That would in this case, by the aid of the evidence, ascertain the width as to part ; but, as to the other parts of this road, it would not give the rule, and the report should expressly define it. It was further urged, that this being an actual road, used and travelled after the order confirming it, it must subsist and be reputed as a road till the order is quashed. The authorities cited do not support this principle, or rather, an application of it to this case. The statute expressly says, “that the road, as *altered* or “*opened*, shall be a public highway.” If, therefore, it has not been *so altered or opened*, it is not a highway, but continues part of the freehold of the possessor of lot No. 10, and the legality of such proceedings is constantly tried in actions of trespass. This road may be of much public utility. If it be, it is still open to the parties to make a regular and effectual application under the statute.

It is important that the very extensive powers the act confers should not be exercised loosely and unsatisfactorily. The want of some of these preliminary matters of form may be considered afterwards not of sufficient importance to annul the order ; but it is of the very essence of the thing that the report of the intended new road should be certain, definite and intelligible. This is decidedly otherwise. It leaves a large portion of the road to be decided upon hereafter ; and though a road might be so circumstanced, perhaps, that the order might be considered good *pro tanto*, although as to a space beyond it was not final, yet I think clearly this is not such a new road as could be taken up in that manner by pieces. It is professedly for connecting Toronto with the town of York, by Farr's Mills. That is the change asked for. Nevertheless, the road stops short several miles from Farr's Mills, and is, for all we know, yet to be reported upon.

The expectation that it would be a complete route from one point to the other, may have induced some to ask for it or to forbear opposing it, who would have acted differently, if they were aware that it was to stop midway in the course.

I am of opinion that a verdict should be entered for the defendant.

SHERWOOD, J., agreed with the Chief Justice upon the fifth, sixth and seventh points. He also intimated his opinion that some of the other objections might be found sustainable.

MACAULAY, J.—The evidence does not show any application to the surveyor; or that the notices were given; or that the report was made to the *next* sessions; or that there was no opposition; or that it was confirmed *thereat*; or that the road was ordered to be opened according to law. A perusal of the English cases, arising under acts of parliament not dissimilar in terms, and passed for similar purposes, will shew that a more rigid compliance with their provisions is requisite than has generally, I fear, been supposed or practised in this province. At present, however, I abstain from expressing any opinion upon the points hinted at. I think the present indictment unsustainable, by reason of the fifth, sixth and seventh objections. I question whether the first, second, third, fourth, eighth and ninth are not also fatal, but do not pronounce any positive opinion upon them.

The road in question cannot be recognized as a public highway, owing to the defective proceedings, and want of conformity with the provisions of the act of 1810, which appear on the face of the documents produced. The report is insufficient; the act requires it to describe particularly the new highway or road intended to be opened, which this does not do, especially as respects the width and some portions of the line. It is unnecessary to pronounce any opinion upon other points, but I doubt much whether other objections are not equally fatal. When a road is required to be proved under the act, an observance of its provisions must be shewn. The surveyor can only act at the instance of twelve freeholders. He must give notice of the report to be made. It must be submitted at the *next* sessions, and if not opposed, be confirmed *thereat*, and the road *ordered* to be opened.—
10 Mod. 150; 11 Ea. 375; 2 Chit. Rep. 385; 1 M. & S. 442; 12 Ea. 384; 8 T. R. 207; 6 T. R. 147; 6 B. & C. 646; 3 Esp. 199; 5 Taunt. 640; 1 Marsh. 261; 2 M. & S. 558; 4 B. & C. 732; 7 D. & R. 221; 8 B. & C.

785; 1 B. & A. 373; 1 B. & C. 622; 3 D. & R. 6; Plow. 240; 11 Co. 45.

Per Cur.—Let the verdict be entered for the defendant.

MCKINNON V. BURROWS.

In covenant for title, the breach assigned was, that defendant had no title. The defendant pleaded that he was lawfully seised, &c. *Held*, that the affirmative of this issue lay upon defendant, although the plaintiff offered no evidence in support of his breach.

Covenant for title. The plaintiff declared on a deed from the defendant to him, of a small parcel of land in Bytown. The breach assigned was, that at the time of conveying, &c., the defendant was not seised of the premises in fee, as he covenanted that he was. The defendant pleaded that he was seised in fee, and on this issue was joined. After proof of the execution of the deed, it was admitted that the land was wild and uncultivated when the defendant sold it, and that the plaintiff took immediate possession, under the deed from the defendant, erected several valuable buildings upon it, and has remained in undisturbed possession ever since. The defendant moved for a non-suit, alleging that the evidence established a *prima facie* case for him; and that he could not be obliged to go further till the plaintiff, by a preponderance of evidence, destroyed the presumption in favour of the title. Sherwood, J., before whom the case was tried, nonsuited the plaintiff. And *Draper*, in Michaelmas Term, obtained a rule calling upon the defendant to show cause why this nonsuit should not be set aside, and a new trial granted. *Kirkpatrick* argued, in Hilary Term, for the defendant, but judgment was deferred till this term.

ROBINSON, C. J.—It is undoubtedly a general rule, that a negative is not expected to be proved, and the *onus probandi* lies on the party pleading the affirmative, who is therefore required to begin and make good his allegation.—*Vin. Abr. Ev. s. 6.*

There are exceptions to this rule, as where the existence of the negative would imply criminality, or induce a forfeiture, then the affirmative shall be presumed, so far, at least, as to require some probable proof to be given of the negative. *Williams v. E. I. Company*, 2 Ea. 199; *Frontine v. Frost*, 3 B. & P. 306, recognize these exceptions. There are also

cases, in which knowledge of the fact in issue lies peculiarly with the party pleading negatively, and in such case he is expected to prove the negative.—*1 T. R. 648.*

It cannot be said that this case comes within any of these exceptions; and, indeed, so far as regards the knowledge of the fact to be proved, the defendant must be supposed to possess it rather than the plaintiff. This is the case of a simple covenant for title against all the world; there is nothing whatever to qualify or restrict it to a covenant against the acts of the defendant himself, and to bring it within the case of *2 B. & P. 18*; if there were, it seems to me the question of *onus probandi* would be materially affected by it, because then the covenant could only be shown to be broken, by showing some positive act done by the defendant. I cannot say that I see the reasonableness of the principle in a strong point of view, in which it is held, that a person taking a covenant from another, that he is seised in fee, may turn immediately upon him and sue him upon his covenant, alleging a breach and claiming damages; and that at the trial he need not pretend to know or prove anything contrary to the covenant, but must recover, unless the defendant can shew a title; thus throwing the burden wholly upon him, without making out even a *prima facie* case to call the title in question, or even pointing out any defect. The law, however, and I have no doubt on good reasons, establishes this principle; and I can find no authority for holding otherwise, than that in an action on such a covenant as this, the defendant, affirming his title to be good, is bound to begin and to prove what he affirms. The general manner of assigning the breach has been also held sufficient. I refer to Bradshaw's case, *9 Co. 61*; *Muscot v. Ballet, Cro. Jac. 369*; and *Glenister v. Audley, Raym. Rep. 14*, which is a very material case upon the principles of this action. It only remains to be determined, whether any such evidence of title was in fact given, as defendant could rely upon for proof of the affirmative. If there was, the plaintiff may have been rightly nonsuited; if there was not, the nonsuit should, of course, be set aside. Under the evidence given at the trial, my impression would, I think, have been, that it lay upon the plaintiff to show some defect, after the defendant had shewn

that he took, and still enjoyed, undisputed possession under his deed ; but on consideration, I cannot find that the defendant can be admitted to have given evidence of title sufficient to go to a jury. The strongest construction it admits of is this, that plaintiff having gone into possession, under his deed from the defendant, of this unoccupied lot, and not having since been disturbed, the jury might take the possession *prima facie* to have been derived from defendant, and thence inferred that defendant was in possession when he gave the conveyance ; and that as possession is *prima facie* evidence of a seizure in fee, it might be held that the defendant was seised in fee when he conveyed. But there is nothing to support this idea. A plaintiff, claiming in ejectment, proves a *prima facie* title, by shewing a conveyance made to himself, by a person who was at the time in possession, and he need go no further back to prove the title of his grantee; but what is there here to show a title even *prima facie* in the defendant when he conveyed to plaintiff (and that is the issue), not that he had received a deed from any one, but simply that the plaintiff, to whom he gave a deed, found the lot unoccupied.

SHERWOOD, J.—To determine the question raised, I think it necessary to enquire : 1. Which party was bound to prove the issue on the special pleas ? 2. What evidence was necessary to prove this issue ? The general rule of evidence is, that the party alleging the affirmative is bound to prove it. It is also a general rule, that the burthen of proof lies on the party who has to support his case by the proof of a fact which rests peculiarly within his own knowledge, and of which he is necessarily supposed to be cognizant, rather than his adversary.—1 T. R. 648 ; 4 B. & A. 140 ; 5 M. & S. 211. The present case comes, I think, within the principles of both rules, for the defendant in his pleading alleges he is seised in fee, and the fact of course must be known to him, if it at all exists. It would not be reasonable to suppose the plaintiff to be as well acquainted with the title of the defendant as he himself is, and therefore the *onus probandi* lies on the defendant. The next question is, what evidence was necessary. It was admitted that the lands which the defendant sold were then uncultivated, and that the plaintiff took immediate possession of them under the deed from the defen-

dant, and erected valuable buildings. The covenant in the deed, upon which this action is brought, expressly declares the defendant was seised in fee when he sold. This necessarily implies that he assumed to have the legal possession when he sold ; and as the plaintiff entered immediately and erected buildings on the land, without claiming title or pretending to hold possession from any other person, it must be presumed, in the absence of all adverse testimony, that he received the possession from the defendant. This is unfavourable to the course of dealing and transactions among mankind. If A. purchases property from B. and goes into possession, the natural presumption is, he got the possession of B.; and if A. asserts he did not, he is not entitled to credit in a court of justice, unless he proves from whom he got it. The presumption that he got the possession from the person who sold him the property, would greatly outweigh his bare denial of such an occurrence, and cast upon him the burthen of explaining the matter, by shewing in what way he got the possession. In the present case, the counsel for the plaintiff did not deny, either at the trial or in banc, that he got the possession from the defendant; and I therefore feel warranted in concluding that he went into possession under the deed, and by the permission of the defendant. Now it appears to me, the taking possession under the conveyance from the defendant, and by his consent, is an admission, so far as the plaintiff is concerned, that the defendant held the possession when he gave such conveyance and permission. I think many cases go to prove this position, and I will mention a few of them, which seem to me analogous in principle. Admissions arising from demeanour and conduct are conclusive evidence against the party, where he has derived a benefit himself, or occasioned a prejudice to another. As where a bankrupt petitioned for his discharge under 49 Geo. III., ch. 3, it was held he could not, in an action against his assignees, dispute the validity of the commission ; for having availed himself of it for one purpose, he, by that act, admitted its legality.—3 B. & C. 153. In actions of use and occupation, where the tenant has taken possession by the plaintiff's possession, he cannot dispute the title.—5 B & A. 626. A landlord, by allowing his tenant to expend money upon improvements without objection, admits his consent to the

alteration made by the tenant.—3 Taunt. 78. A defendant is estopped by the recognizance of bail, entered into by the name in which he is sued, from pleading a misnomer, although he is no party to the recognizance, for by the entry of the recognizance he is benefitted, and if he does not object to the entry, he is conclusively bound.—2 N. R. 453. In the present case, the plaintiff entered into possession under the conveyance from the defendant, and has held and enjoyed ever since. If a party, who holds goods as a lien, claim them on another ground when the owner demands them, he admits he has no lien on the goods.—1 Cam. 410, n; 1 M. & S. 147. If the occupier of a house submits to a distress for rent, described in the notice of a distress to be due by him to the distrainer, it is an admission of the title of the distrainer, and that he holds as his tenant.—1 H. Bl. 311; 3 Cam. 372. The not having an attorney's bill taxed is an admission that all the charges are reasonable.—1 Doug. 198; 3 Camp. 372. In an action against the owner of a stage-coach for negligence, whereby the coach broke down, and the plaintiff, a passenger, was injured; the breaking down of the coach was held to be *prima facie* evidence of negligence, and that negligence might be presumed from that fact.—2 Camp. 79. A deed, by which a person conveys "one full moiety of a ship," is *prima facie* evidence that the grantor is seised of the other moiety, if there be no testimony against the presumption.—5 Taunt. 257. The presumption of the defendant's possession in this case is as strong, if not stronger, in my opinion, than any of those judicially admitted in the cases which I have just cited, and therefore should be considered equally conclusive, as respects the parties in this suit. It only remains now to examine, whether possession of lands alone is evidence of a seisin in fee, and if so, whether such evidence was sufficient to sustain the issues for the defendant in this case, without further proof of that fact till the legal effect of such testimony was destroyed by more conclusive evidence on the part of the plaintiff, destructive of the presumption in favour of the defendant already mentioned. That possession is *prima facie* evidence of a seisin in fee, the following authorities seem to establish.—Bull. N. P. 103; 4 Taunt. 16; 3 C. & P. 610. The counsel for

the plaintiff at the trial insisted that the defendant was bound to derive his title from the crown, in order to shew, beyond all doubt, that he was the legal owner; and indeed it must be admitted, such evidence of title would have been most satisfactory, but still, I think, the defendant was not driven to the necessity of producing it till the plaintiff had, by other testimony, destroyed the presumption of title in the defendant, arising from his possession of the premises. *Stabit presumptio donec probetur in contrarium* is a maxim which the policy of the law sustains, because it often affords support to good titles which have accidentally become defective, by the loss or destruction of written documents, or by the death, absence, or mental imbecility of witnesses. There is another rule, however, which at first sight seems to come in collision with this maxim, which is, "that the best evidence must be given to prove any disputed fact." Upon examination, I think, it will be generally found, that the ground of the last rule is the supposed existence of fraud in the party who offers the inferior evidence; for if it appears that there is better evidence of the disputed fact, and that such evidence is withheld, the law immediately raises a presumption, that the interested party is induced, by some improper motive, to withhold the best evidence. It is clear, however, this rule does not impose the necessity of adducing the greatest possible proof in every case; but it means only, that the nature of the proof shall be of the highest class in the scale of evidence which appears in the power of the party to produce. For instance, the law does not recognize the validity of a will respecting lands, unless it be attested by three credible witnesses, and yet on a trial before a jury, it may be proved on the oath of one. So any other fact may in general be proved by one witness, though many others are well acquainted with it. The rule, therefore, that every fact must be proved by the best evidence, relates, I think, rather to the quality than the quantity of proof, and is never applicable, unless it appears that evidence of a superior grade is in existence, and within the power of the party. In the present case it was not alleged, that any better evidence of title could be had, or that any other person held the possession when the defendant executed the conveyance, or had any claim to

it as the legal owner. I incline to the opinion that possession of lands is evidence of a seisin in fee, liable, of course, to be destroyed by stronger evidence, shewing that some other person in fact is the legal owner; and that there was presumptive evidence of possession in the defendant when he executed the conveyance to the plaintiff in this case. I am, therefore, of opinion the nonsuit should stand.

MACAULAY, J.—This case, in my opinion, depends upon the precise nature of the facts proved or admitted at the trial. I think, that upon the pleadings, it was incumbent on the defendant to prove a seisin in fee, but that *prima facie* evidence thereof was sufficient; and that possession, as ostensible owner, or claiming the estate absolutely, without recognizing any paramount title or claim, would constitute such *prima facie* evidence. If, therefore, it was in this case proved or admitted, that the defendant, at the time of the conveyance to the plaintiff, held such a possession, that, I should conceive sufficient in the first instance, and until his presumptive right, arising out of such possession, be impeached. But if it merely appeared, that the land in question being wild and uncultivated, and not reduced to possession by any visible occupation, was claimed by the defendant as his, and conveyed by him as his in fee simple, without any proof of actual possession, I do not think that such bare assertion of right, unaccompanied with proof of concomitant possession (although after the execution of the deed, the plaintiff received from defendant, or took, as purchaser under him, the actual possession, and continued in the enjoyment thereof until action brought) any sufficient legal proof that defendant was in legal possession before, and at the time of the conveyance. I do not conceive such a circumstance, as possession by the plaintiff subsequent to the deed, evidence from which possession in the defendant antecedently thereto may be inferred, for the fact may subsist without, as well and as consistently as with such prior possession.—Jenk. 305 ; Yel. 227-8 ; Cro. Jac. 312 ; 3 Lev. 193 ; 4 Esp. 221 ; Willis, 102 ; 5 Taunt. 326 ; 1 Mar. 68 2; 3 B. & C. 98, 307; Roscoe, Real Act, 587 ; Co. Lit. 15, a ; 11 Ea. 498 ; Cow. 596 ; Phill. 187 ; 3 Star. 453.

Per Cur.—Rule absolute.

EVERARGHIM V. LEONARD, SHERIFF OF NIAGARA.

Where a writ of *fieri facias* was placed in a sheriff's hands against the goods of a defendant, who was in possession of personal property in his district at the time, and a levy was made, but the plaintiff afterwards compromised with the defendant, receiving payment of his debt by instalments, but giving no directions to the sheriff to discharge the defendant's property ; *Held*, that on a return of *nulla bona* by the sheriff, several months afterwards, when the defendant had absconded without satisfying the balance of the debt, the plaintiff could not sue for a false return, as he was precluded by the arrangement which he had made with the defendant.

Case against the sheriff of the District of Niagara, for falsely returning *nulla bona* to a writ of *fi. fa.* against the goods of one Hugh Vanderlip, with a count for not levying.

The plaintiff recovered a judgment against Vanderlip, which was entered 12th November, 1827, and a *testatum fi. fa.* against goods awarded, directed to the sheriff of Niagara, returnable 1st of Easter, 1828. In Easter Term, an *alias fi. fa.* against goods issued, directed to the same sheriff, returnable the *last* of Easter, 1828, indorsed to levy 219*l.* 14*s.*, with sheriff's fees and interest on 216*l.* 17*s.* 1*d.* from 4th October, 1827. This writ was received by the sheriff on the 28th of April, 1828. It was produced at the trial, or rather a copy of it proved, with a return of *nulla bona*, and it was upon this return, alleged to be false, that this action was brought. It was proved by the evidence of plaintiff's attorney, and of another attorney, his agent in the country, that when this writ came to the sheriff, and for twelve months or more after, the defendant had goods sufficient to answer the debt, and more ; he was a merchant and kept an open retail store. There is every reason to conclude, that the deputy-sheriff levied under the writ ; he admitted that he did so, for he asked whether he should go on and sell, and the whole evidence for the plaintiff tends to shew that he did levy ; but whether he did or not, it is proved, that on 12th June, 1828, six weeks after the return of the writ, the plaintiff entered into an arrangement with the defendant, giving him time to pay by monthly instalments, and wrote to the sheriff apprising him that he had done so. Under this arrangement, the defendant went on making payments to the plaintiff, and in all he paid about 125*l.*, fully half the debt. After the sheriff was apprised of his having made some payment, he asked the agent in the country whether he should go on and sell, and was told that

he could give him no instructions whether to sell or not. In November, 1828, the defendant probably not being regular in paying his instalments, the sheriff was applied to for a return of the writ, the plaintiff wishing to take out a *venditioni exponas* or some other process of execution ; but he did not make the return, alleging that he had at one time mislaid the writ, and procrastinating, as is too often done, for various causes. Somewhere about or before Trinity Term, 1829, the defendant absconded, and in Trinity Term, 1829, the plaintiff first ruled the sheriff to return the writ, and in consequence obtained the return of *nulla bona*. Verdict for plaintiff, with leave to move.

A rule nisi to set aside this verdict and enter a nonsuit, was obtained in Michaelmas Term last, and argued by the *Solicitor-General* for the plaintiff, and *Baldwin* for the defendant ; and now judgment was given.

ROBINSON, C. J.—It is true, that the sheriff, for all that appears, never received any direction to abandon any seizure he had made, and was never expressly relieved from any responsibility, in consequence of what he either had done or ought to have done. He was merely directed not to sell, unless pressed by other executions. This was the purport of the instructions sent him in June, 1828 ; and on this the plaintiff relies for his right to recover. On the other hand the evidence, which is wholly on the side of the plaintiff, for the defendant called no witnesses, tends strongly to shew, that the sheriff would have sold if he had not received instructions to the contrary, and only waited for instructions to sell, after he had received these instructions restraining him. But a scrupulous enquiry into minute circumstances is not necessary. It is clear from the authority of many cases, that upon the main facts which were proved, the plaintiff cannot have this action against the sheriff. It is true, that the return has, strictly speaking, a reference to the period when the writ is returnable ; and it is clear, that the sheriff, in saying that the defendant had then no goods, returned what was not true. But it does not therefore follow, that he is liable to damages in this action. In all actions of this kind, which are not *stricti juris* upon framed writs, but actions upon the equity of the case, whatever shews that the plaintiff ought

not to recover will bar his claim to damages. Now, as this case stood, it was of no consequence whether the sheriff made a true or false return to this writ, returnable in April, 1828 ; for if he had levied under it, the plaintiffs afterwards abandoned that levy and waived all recourse upon the sheriff, by entering into the compromise with the defendant.

He was not bound to retain the goods an indefinite time, nor one moment, as I think, after he was apprised of what had been done. The sheriff had either seized or not seized before the return of this writ, i. e., before the end of Easter Term, 1828. When the plaintiff, at the request of the defendant in *June* following, entered into an agreement to pay by instalments ; if the sheriff had not levied he acquiesced in his forbearance ; if he had levied he must be taken to have abandoned it, for it is clear, that where a defendant's goods have been seized to the amount of the debt, he is thenceforth discharged, and can plead that matter as a discharge, though the plaintiff may never get anything ; the responsibility is transferred to the sheriff. By treating with the defendant in person, therefore, in June, the plaintiff admitted that he was not discharged, and waived his recourse against the sheriff. I am sure no case can be found of a recovery against the sheriff, under circumstances at all like the present. Besides, the sheriff was let alone till November. He could not tell how much of the debt the defendant had paid in the meantime, and the goods which he must have seized in April, if he seized at all, were, with the knowledge of the plaintiff, and without his dissent expressed, allowed to be openly disposed of by the defendant at that time, and it was from the proceeds of such sales the plaintiff expected to receive his monthly instalments from the defendants. They suffered from their forbearance, for before all the debt was paid the defendant ran away. It is very probable, I think, that if the sheriff had returned the writ when he was asked to do so in November, the plaintiffs might have recovered this debt ; but I am not prepared to say that, under these circumstances, he would have a remedy against the sheriff in any form of action, for the damage sustained by his neglect, after their personal interposition and dealing with the defendant. In this action they certainly could not.

SHERWOOD, J., concurred.

MACAULAY, J.—After the delays that took place with the assent of the plaintiff's attorney, under the compromises, the payments and other circumstances in evidence, I think the sheriff was warranted in relinquishing the goods seized ; and that the plaintiff cannot sustain an action of the present kind against him for a false return of *nulla bona*. Though not true in fact at the return-day of the writ, it was true in fact at the time of the return ; and if not true in fact, the plaintiff cannot avail himself of the falsity to enforce damages against the sheriff. The plaintiff has waived his remedy against him, for such false return, by his own conduct and indulgence to the original defendant.—2 L. Ray. 1072 ; 1 Sal. 322 ; 2 Show. 394 ; 1 R. & M. 310 ; 2 C. & P. 100 ; 1 C. & P. 154 ; 5 T. R. 470 ; 2 Mar. 330 ; 7 Taunt. 5 ; 8 B. & C. 132 ; 3 M. & R. 17 ; 1 Star. 388 ; 6 M. & S. 42 ; 3 Camp. 523 ; 11 Ea. 297 ; 15 Ea. 79.

Per. Cur.—Rule absolute.

LANE V. MELVILLE.

Where the defendant in this country, ordered certain articles of clothing to be made and sent to him by the plaintiff from England, and on their arrival here, they were received by the plaintiff's agent, who did not tender them to, nor leave them with defendant, although he demanded payment for them, which was refused ; *Held*, that an action for goods sold and delivered would not lie, but that the plaintiff should have declared specially for the non-acceptance.

Assumpsit for goods sold and delivered. The plaintiffs are tailors residing in London, and the defendant was formerly a captain in the 68th Regiment, serving in Lower Canada, and is now a resident inhabitant of this province. The defendant pleads a tender as to part, and non-assumpsit to the residue ; and the question turns on his liability to pay in this action, for certain articles of regimental clothing, which have never been in the actual possession of the defendant, but which the plaintiffs nevertheless contend he is liable to pay for, under the circumstances of the case, as for goods sold and delivered. The declaration contains, besides the count for goods sold and delivered, a count for work and labour, and materials found, and the common money counts, with one upon an account stated. There is no special count for not accepting goods, nor any count for goods bargained and sold merely. The evidence, so far as it respects the question in

argument, was contained in the answers to interrogatories taken upon a commission. In substance, it was as follows : the plaintiffs having one John Lane in Canada, as their travelling agent, or, as he called himself, their itinerant clerk, to receive orders for goods in their line, and to settle with their customers ; the defendant gave him an order for certain clothes, and, among others, for a regimental coat and a pair of wings, according to the uniform of the regiment in which he was then serving in Lower Canada. The order was sent to London by the plaintiff's agent, and the goods made and sent out to that agent, for all that appears, within a reasonable time. When they were received by the agent, the defendant was not in Lower Canada. He had in the meantime gone to the West Indies on private business. The 68th Reg. had left this country, and was stationed at Athlone, in Ireland ; but the defendant had sold out of the corps, and having his family resident in Montreal, had gone to the West Indies merely for a time.

The agent seems to have received these goods in a package with others, for in an account rendered by him, he charges the defendant for his part of the expense of a tin case, and for part of the expense of shipment. The defendant being from home, he called at his house ; he had not these articles with him, which are the cause of this dispute, and therefore did not actually tender them, nor does it appear that he went there for that purpose ; but finding a lady in the house, who was merely a member of the family, not the wife of the defendant, nor a servant ; he told her that Captain Bing, an officer of the navy, would take a surtout, which was one of the articles sent out, but not one of those in dispute, and asked her if he should let him have it. She neither gave any directions, nor made any objection. He asked her also, what he should do with the regimental coat and wings ; she answered that he might do as he pleased. There was no evidence to shew that she had or pretended to have any authority in the matter ; it only appeared that she was the mother of the defendant's wife, living in the family, and that on this occasion she came to the door, and gave these answers to the questions put to her. The agent then shipped the regimental coat and other articles of uniform back to England, and from

thence took them to the regiment in Ireland, where he attempted to dispose of them, as he says, for the defendant's benefit, but failed ; and he then took them back to England to the plaintiffs' shop, where they still remain. And the agent swore, that a letter was written to the defendant, and sent out from England by one of the New York packets, requesting instructions what they were to do with the clothes. The agent further proved, that before bringing this action he called on the defendant, after his return to this country, and requested payment of his account. He said he would pay for what he had got, but for nothing else ; that is, he refused to pay for these things, which are still in the plaintiffs' hands in England. At the trial at the last assizes for the Niagara District, before the Chief Justice, the defendant had a verdict ; and in Michaelmas Term last, *Sullivan* obtained a rule nisi to set this verdict aside, and grant a new trial ; to which the *Solicitor-General*, in Hilary Term last, shewed cause. The court deferred pronouncing judgment till this term.

ROBINSON, C. J.—Whether the defendant meant or means to deny his obligation to accept these articles, on account of anything that has happened since he ordered them, does not appear. Whether he is bound to accept them, or to pay damages for not accepting, or to pay for them as goods sold to him, though not delivered, is not the question. The point before us is, whether the plaintiffs are in a situation to sue the defendant for these articles of regimental uniform, as for goods sold and delivered ; and if not, whether he can recover for them under any other count in the declaration.

I am not to determine now, and I had no authority to determine at the trial, whether he could be compelled to pay the value of these goods, or damages less than their value, in any other form of action ; and I have no right to anticipate what he would do if the goods were brought to him, or what opposition he would make to a demand urged in any other shape. The legal objections to his remedy in this action are to be disposed of on legal principles. I was bound so to treat the case at Nisi Prius, and, under my direction, the jury found for the defendant. If that verdict is not against law it should stand, because the defendant is entitled to retain it.

It is contended the verdict is against law and evidence, and that the plaintiffs were entitled to sue for these goods as for goods sold and delivered. I think they most clearly were not. I place the Statute of Frauds wholly out of the question, taking it to be clearly decided, that it has no application to this case, the goods ordered not being in existence at the time of the contract. And it is material to consider this, because several of the cases, which apparently bear upon the question of the delivery of goods, are decided with reference to the 17th sec. of the Statute of Frauds ; the question in those cases being, whether the goods, or any part of them, have been so *delivered* and *accepted* by the vendee, as to bring the contract within the exception stated in that clause of the statute. The case of Anderson v. Hodgson, 5 Price, 632, is of this description, and is on that account not material to the decision of this question, as it might at first sight appear to be ; because it is one thing to prove goods so delivered and accepted as to entitle the vendor to sue upon a contract respecting them, which would otherwise be void under the Statute of Frauds, and another thing to prove them delivered, either actually or constructively, so as to entitle the vendor to sue for their value as for goods sold and delivered.

The plaintiffs in this case have not proved these goods to be delivered, upon any of the principles which govern the question of delivery between vendor and vendee. And this seems to me so clear, that, after looking into all the cases I can meet with upon this point, I am as unable now as I was at the trial to comprehend upon what footing the plaintiffs can pretend they have delivered these goods. It is hardly necessary to say, that there may be easily found cases, in which a vendee must pay for goods which he has never received, because such goods may have been constructively delivered to him, though they have never reached his hands. If a person in this country orders goods from England, sending no directions as to their shipment, when such goods are actually shipped in the common course of trade, consigned to the vendee, they are from the moment considered as delivered to the vendee ; they are at his risk ; and if, from accident or the negligence of the carrier, they never reach him, the loss is his, and the vendor may recover for the goods as goods sold

and delivered. In some cases, not very modern, there are dicta to the contrary—Cowp. 294; but this point seems to be now fully settled as I have stated it.—8 T. R. 332; 3 B. & P. 584; 2 N. R. 119. So that if the plaintiffs in this case had simply shipped these goods consigned to the defendant, and had no concern with them afterwards, themselves or through their agent, I see no reason, from anything proved at the trial, why the defendant must not have paid for them, whether they ever got to him or not; he must have paid for them, I think, though they might have been lost on the passage, or by negligence after their arrival; or though they might have been tortiously converted by a stranger, or by any person entrusted to carry them. But these goods were not consigned to the defendant; there is nothing to shew that they were, but there is evidence to shew that they were not, and the facts themselves admit of no other inference. It is not pretended that any bill of lading accompanied these goods, shewing that they were consigned to the defendant. That they were accompanied by a bill of lading consigning them to some person, there is no reason to doubt; it is the constant course of such transactions. The case of Lickbarn v. Mason, 2 T. R. 75, and Brown v. Hodgson, 2 Camp. 36, are authorities to shew, that the court will recognize no property but that recognized by the bill of lading. Now the plaintiffs do not pretend that there was any bill of lading, consigning these goods to the defendant; but they prove, on the contrary, that when they came to this country, it was their agent alone who heard of them and received them; that agent also declares, that he thinks they were sent to him because the plaintiffs were uncertain whether the regiment might not have moved; and further, he charges the defendant for a part of the expense of the tin-case in which they came, and for part of the shipping charges, which proves that they came to the agent along with other articles; I suppose for other customers. Then while these goods were in Montreal in the hands of the plaintiffs' agent, they were not, in my opinion, delivered to the defendant; that he might have fixed the defendant with them (to use the term), I have no doubt; he might have left them at his house, or at least have tendered them there, and if he meant thus to act, he should have

done so unequivocally and decidedly ; but he does not seem to have intended it.

Having no direction from the defendant, or on his behalf, he retains the goods in his custody undelivered, and takes them to Ireland to sell them for the defendant's benefit. I have no idea but that he meant to act quite fairly in taking this step, but, without blaming him for it as to intention or effect, it is no delivery to the defendant. Supposing he had been able to sell them, and had sold them to a third person for a less sum than they were worth, could he have compelled the defendant to make up the difference ? I doubt it upon this evidence. I think a court and jury must have had more proof than is here afforded, of an express or implied authority from the defendant to dispose of the goods as he thought best, and make him, the defendant, bear the loss. But, what is more to the purpose, supposing he had sold them in Ireland, and had paid over the money to the plaintiffs, his principals, or kept it in his own hands, could they, while the money obtained from the sale of the defendant's goods was in their hands or their agent's, have sustained this action for goods sold and delivered against the defendant ? I think clearly not, unless it was shewn, that the sale of the goods was authorised by the defendant, and then the amount they had brought would have been the subject of a set-off against the plaintiff's demand. Not being able to sell them, the agent takes them back to the plaintiffs, and, in my opinion, they are now just where they began, or rather as they were when they had finished making the clothes, and before they had shipped them.

A tailor in London, who is ordered by a customer here to send him clothes, has no right of action when he has merely made the clothes ; he must at least ship them and send them off : here the plaintiffs sent them, and, through their agent, have taken them back, which is the same as if they had not sent them. The case is even stronger than that against them, for they were never sent to the defendant ; they merely sent them to their own agent ; he never absolutely tendered them to the defendant, or at his house ; if he had, and they had been rejected, in consequence of which the plaintiffs received them back, their remedy would not be

for goods sold and delivered, but for goods bargained and sold, or for not accepting them. But we have no evidence that the defendant ever refused to receive them ; he said he would pay for what he had received, and for nothing more, and he had a right to say so. The plaintiffs have still these goods ; if they now again ship them, consigned to the defendant, they may contend, that such shipment is a delivery, and leave it to the defendant to shew why he should not pay for them, but while they keep them they are not delivered, as between vendor and vendee ; and whatever might be the case under other circumstances, nothing has happened here, in my opinion, to authorise the plaintiffs to keep these goods, and sue at the same time for their value, as if they were delivered.

Frequently, in cases of sales, the property is so far vested in the vendee that he may bring trover for it, and may claim to have it regarded as his, so far as third persons are concerned ; and yet the vendor, withholding it from him, shall not be able to recover as for goods sold and delivered. Again, the property may at one time be in the vendee by a constructive delivery, and the vendor may afterwards countermand that delivery. The case of *Goodall v. Skelton*, 2 H. Bl. 316, fully establishes that, and not merely in cases of stoppage *in transitu* on the principle of lien. If a vendor following his goods *in transitu* should wantonly destroy them or should take them home and keep them or sell them to another, when he had clearly no right of lien to stand upon, there would, in my opinion, be no pretence for his suing for goods, though evidently they had been once delivered ; his own subsequent act rescinds the delivery and destroys the claim.

But it deserves consideration, what ought to be the effect of the letter, which the witness says the plaintiffs wrote to the defendant, apprising him that the goods were there, and asking instructions. It was not proved to what place that letter was directed. No copy was produced—no evidence that defendant received it, and it was not sent by post ; but if it had arrived, and we had legal evidence of its contents, it cannot, I think, constitute a delivery of the goods, actual or constructive. If the defendant chooses to give them no

directions, they should send him his goods, if they mean to deliver them, or seek some other remedy if they do not.

It remains now to be determined, whether a verdict might not have been rendered under the count for work and labour and materials found. I cannot find any case in which that count has been so applied, and it seems to me not safe or reasonable that it should be. When work and labour are applied in making an article to be delivered by a tradesman, he clearly cannot sue merely because he has done the work and labour; he must give the defendant the benefit of his work by delivering the things made. If the delivery is rendered impossible or unnecessary by the defendant's act, then this count may perhaps be resorted to, though I find the usual remedy is for not accepting or for goods sold; but I do not see on what principle the plaintiffs could be permitted to recover on it in the present circumstances of this case.

The objection to the plaintiffs' recovery upon these facts lies equally, in my opinion, in regard to either form of action. When a person resident in this country orders goods of a tailor in London, it is neither the effect nor the intention of such a contract, that the tailor shall have his action for the goods, or for making them, as soon as he has completed them. The customer must have received them or refused to receive them, or the other must at least have so far put them into the way of reaching him, that if they were never received it should arise from some misfortune or negligence for which the seller is not liable under the circumstances. Neither of these is the case here. The vendor sent them out to his agent, and that agent, following his own judgment, sent them back to the vendor.

The vendor has either now a right to call upon the vendee to receive them, or he has not; if he has not, he can certainly have no right to make him pay for them; if he has, then that is the course which I think he ought to pursue, and not retain the goods, and at the same time seek payment for them.

SHERWOOD, J., concurred.

MACAULAY, J.—It appears the order for the clothes was given in Canada, to a traveller or agent of the plaintiffs. It was known the articles were to be made up and sent from London. It would seem, therefore, that the plaintiffs were

not bound to *deliver* the goods in Canada ; that it was a general order, and not a special contract to be executed here. The things might be delivered in Halifax, the West Indies or Ireland, should the defendant have removed to any such part of the world. Consequently, if, when shipped, they had been consigned to defendant, they would have been at his risk and not at plaintiffs'. It is well settled, that when goods are delivered to a carrier or shipped for a purchaser, and consigned to him, they vest in the consignee, and such act of consignment constitutes a delivery, subject only to stoppage *in transitu*.—1 Camp. 40 ; 8 T. R. 430 ; 2 Camp. 36, 639 ; 3 Camp. 255 ; 3 B. & P. 584 ; 5 Burr. 2680 ; Cowp. 295 ; 2 N. R. 519 ; 3 P. W. 186 ; 1 Ea. 253.

It is also clear, that the mere making of the clothes did not vest an absolute property in defendant, much less did it constitute a delivery.—1 Taunt. 320 ; 3 B. & C. 419 ; 5 D. & R. 279 ; 7 B. & C. 26 ; 5 B. & A. 942. And the first question is, whether any further act amounted to a delivery, so as to sustain the count for goods sold and delivered. If they were shipped for and consigned to defendant, that would have effected a delivery ; but the evidence does not shew this to have been the fact. The witness says, "the said goods were shipped to the defendant's direction, according to his express orders," but on cross examination, being asked "to whom directed, and to what agent's care ?" he answers, "they were packed in London, and then shipped on board the Ottawa or British Sovereign ; *does not recollect how directed* ; at any rate agreeable to the general understanding "that took place when the articles were ordered by officers ; "and he thinks directed to him, in case the regiment to which "sent might in the meantime remove." And the bill of particulars includes a charge for a half or a portion only of the case in which packed ; strengthening the presumption, that the defendant's clothes were packed up with others in a large case, directed to the agent in Canada.

By making up various suits or articles of clothing, and directing them to the different individuals for whom intended, and then enclosing the whole in one large case, directed and consigned to the plaintiffs' agent at the place of destination, a *delivery* to the parties would not be effected, and such, it

appears to me, was the course here ; had it been otherwise, it must have been susceptible of unequivocal proof, from memory or from the ship's books, bill of lading, &c., and in such event the defendant only could have received them, and the agent could not have had access to the contents of the trunk, as it is manifest he had. No delivery being effected by the shipment or consignment, it does not appear that any delivery or tender of delivery, actual or constructive, took place at Montreal. The interview with a lady at defendant's residence, I apprehend, affords no evidence thereof, in the absence of any proof that she could be presumed to be an agent of defendant competent to bind him ; and the subsequent transmission of the uniform to Athlone, a step inconsistent with a previous absolute delivery to defendant, of course could have no legal operation, the same being all the time in the possession and under the control and direction of the plaintiffs and their agent. The witness asserts he considered himself the agent of defendant, and as such sent the things to Athlone ; but he does not aver that he was such agent, nor shew nor assert how constituted. If he gratuitously acted as such agent, the defendant does not seem to have assented to or adopted his acts.

It appears then, no actual delivery took place up to the time when the clothes again reached the plaintiffs in London ; and it is to be considered whether what followed constituted a delivery, or entitled the plaintiffs to sustain the count for work, labour and materials, for there is no count for goods bargained and sold. The evidence is, that plaintiffs wrote for instructions, via New York, by the American packets, but received no answer ; and that when called upon for payment, defendant assented to pay for the things actually received, which witness refused, charging more ; and that the articles are now at the plaintiffs' shop awaiting orders. In 2 B. & C., Holroyd, J., says, "a party cannot maintain "an action for the price of goods sold and delivered until he "has delivered them, or done something equivalent to a "delivery, as, for instance, if he has put it in the vendee's power "to take away the goods himself." But the step taken by the plaintiffs would rather, I think, resemble a tender of the clothes, so as to entitle them to sue for goods bargained and

sold, or work and materials, than a delivery, provided the mode of transmission was sufficient to raise a presumption of its receipt, or evidence thereof from which a jury might infer its receipt ; and provided also the contents of the communication could be proved without producing the original or copy, or giving notice for the production of the former.—
1 Str. 506 ; 2 H. Bl. 67 ; 3 Ea. 303. It does not appear how or to whom directed, and the last account given of the defendant was, that he had gone to the West Indies ; whether he had again returned to Canada, and if so, in what place he resided, the witness does not allege. A notice may be sent by *post*—2 H. Bl. 509 ; 9 Ea. 347 ; 1 R. & M. 149, 249—or by private conveyance ; and a notice may be sent by private hand, though the first post would have been more expeditious—Holt, 476—and if there be no post, by the first regular ship—2 H. Bl. 565. But a notice to produce the letter should have been given, to entitle the plaintiffs to prove a copy, or go into verbal evidence of its contents. The witness does not say he ever saw the letter ; he speaks merely in general terms. If it were regularly proved that a letter was sent via New York, by one of the packet-ships, directed to the defendant at a place in Canada, in which he was proved to be residing at the time, the contents being shewn by a copy or verbal proof, after notice to produce the original, I should think it might be left to the jury to say whether the defendant had not received it ; and if they thought so, I conceive a right of action would accrue to the plaintiffs as for goods bargained and sold, if the defendant, after a reasonable lapse of time, gave no instructions. After the trouble taken by the plaintiffs to effect an actual delivery, I am of opinion they were well warranted in retaining the articles in London, and calling for instructions, in failure of which in due course, a right of action would arise against the defendant for their value. But at present there is no legal proof sufficient to establish even presumptively the receipt of the alleged letter ; and if there was, there would still be wanting legal proof of its contents. No notice to produce it appears to have been given—no copy is produced, and the witness who speaks of it does not declare himself to have personal knowledge of its contents. It has not been questioned how far the contract

falls within the 17th sec. of the Statute of Frauds.—4 Camp. 193; 3 Camp. 305, 377; 1 Star. 28; 7 Moor. 112; 3 B. & B. 288; 2 M. & R. 292.

Per Cur.—Rule discharged.

GILBERT ET AL. V. SLEEPER.

In assumpsit for not delivering goods, after the plaintiffs had proved a verbal agreement, the delivery of part of the goods, and also an undertaking by the defendant, that he would not exercise a certain trade within a fixed distance of the plaintiffs, the defendant gave in evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce, and the copy of the agreement in the affidavit of debt not stating anything about that part of the undertaking proved by the plaintiff, concerning the exercise of the defendant's trade; *Held*, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement, by their affidavit of debt, and that as the writing was the best evidence, it should have been produced, and that that part of the evidence, concerning the exercise of the defendant's trade, not being contained in it, should have been rejected.

Assumpsit on an agreement to deliver certain goods. The agreement was set forth in six special counts in the declaration, which contained common counts also. The suit was commenced by arrest upon a judge's order, which order was made on an affidavit of Canniffe, one of the plaintiffs, in which he swears, that on the 23rd March, 1831, he and the other plaintiff agreed with the defendant for the purchase of a certain carding machine, and other goods and chattels, &c., "a true copy of which agreement is now underwritten." And in the affidavit he refers a second time to the agreement. And to his affidavit he annexes a writing, which he, Canniffe, certifies at the foot to be a true copy of the agreement; it is in these words:—

"Belleville, March 23, 1831.

"Memorandum of machinery. Abel Gilbert and Joseph Canniffe, bought of Jonathan E. Sleeper.—One set of carding machines and picker machine, one copper kettle, one shearing machine, one screw plate, one press box, one dye knife, and a quantity of other tools, brushes, and quantity of press papers, wrench and two combs for cleaning said machinery, for which I bind myself to deliver to Abel Sleeper and Joseph Canniffe, the remaining part of the tools that I have not in hands, to furnish them by the 1st

"of August next, or pay all damages ; and also set up those machines and put in the cards, and put them in good order for work.

"(Signed) Jonathan E. Sleeper.

"Witness, Gershon Reed."

The plaintiffs did not declare as upon an agreement in writing ; and at the trial they produced no writing, but relied wholly on evidence of a parol agreement, proved by Reed, the witness to this writing, part of which was, that defendant should not carry on the trade within a certain distance of plaintiffs.

The defendant, at the trial, objected that trover only would lie, and not assumpsit, for the goods not delivered, on the ground that the sale was complete and part of the goods delivered, and that the property in the rest had vested in the plaintiffs. 2. That the agreement proved was void, on account of its being in restriction of trade. 3. Because it is vague and uncertain as to the tools and implements to be delivered. Sherwood, J., before whom the cause was tried, at the last assizes for the Midland District, reserved these points ; and the defendant went into his defence, and produced the copy of the agreement which had been annexed by Canniffe to his affidavit, on which he obtained the judge's order, and he proved a copy of that affidavit. On these he moved, that plaintiff should be nonsuited for not shewing the written agreement, and relying on parol evidence of it. In answer to this last objection, it was urged, that the defendant had not shewn by legal evidence that there was any agreement in writing ; that he should have given notice to produce the original, and was not at liberty to prove a copy. The judge declined granting the nonsuit, but reserved liberty to move on all the objections. A verdict was given for the plaintiffs, for 150*l.* damages, which included damages for carrying on the trade contrary to the agreement.

In Michaelmas Term, *Cartwright* obtained a rule nisi to set aside the verdict or grant a new trial ; to which *Draper* shewed cause, and now judgment was given as follows :

ROBINSON, C. J.—I am of opinion that the first objection taken by the defendant is immaterial. Admitting that a delivery of part of the goods was a constructive delivery, such

as would have enabled the plaintiffs to maintain trover against third parties, or against the defendant himself, still that would not preclude the plaintiffs from recovering damages against the defendant for not delivering them into their actual possession according to their agreement, for such damages might be more than the value of the goods. Frequent instances occur in the books of actions for not delivering, when the facts are nevertheless such as might establish a constructive delivery, upon the question arising in whom the legal property was vested; and, besides, here it is not evident that the goods not delivered were in existence; the defendant was allowed to furnish them as he chose.

The agreement, I think, as proved at the trial, was not void on the ground of its being in restriction of trade. The case of *Mitchell v. Reynolds*, 1 P. Wms. 181, shews, that an agreement, such as was alleged here, made upon a good consideration, may be supported. Neither do I think the agreement, as proved by the plaintiffs, or as set out in the writing produced, void for uncertainty as to the tools to be delivered. All tools which were deficient for the machinery or business which the defendant was handing over to plaintiffs, he bound himself to supply, and he was to set up the machinery, and put them in good order for work. Persons conversant in such business could easily ascertain and describe what remained unfurnished when the day arrived.
Id certum est quod certum reddi potest.

The principal question is, did it and does it sufficiently appear to the court, that there was a written agreement upon the very matter for which the plaintiffs are suing, and if so, is it not fatal that they have not produced it. If this objection does hold here, it is not of consequence to consider a further question that naturally arises—whether, there being a written agreement such as that advanced by defendant, the plaintiffs can claim under an alleged additional article resting wholly on parol evidence, by which they say defendant bound himself not to carry on the same business there. 1. Was it legally proved that there was an agreement in writing between these parties? Gershon Reed swears that he thinks the agreement was not reduced to writing; but then, as he is the very person who attested as a subscribing wit-

ness to the paper annexed to Canniffe's affidavit, he must mean to state this in a qualified sense, and with some explanation. He does so, and he gives his reason for considering that there was no written agreement ; "there was none," he says, "because the plaintiffs did not sign it;" that shows the ground on which he negatives the existence of a written contract—but his reason is inconclusive—though not an agreement, strictly speaking, as to both parties. It is a written statement, by which defendant bound himself ; and if it is proved, and applies itself to this cause of action, the plaintiff cannot disregard it, and sue upon parol evidence.

It may be said, that it cannot be that the whole agreement was reduced to writing, but that the contrary is evident because nothing is stated which the plaintiffs are to do, though it is absurd to suppose that there was nothing to be paid or done on their part. The evidence explains this. They gave their promissory notes for the consideration they were to pay, and it does not appear that having done this they had anything more to do or promise ; then at the same time the defendant specified what he is to do on his part, and specifies it, in my opinion, so fully in writing, that we cannot, consistently with the principles of evidence, receive parol proof that he agreed to anything beyond. This is not a mere list of articles ; it is more ; it not only particularly specifies many articles to be delivered, but it specifies the time for delivery, and binds him to put up the machines and set them in order for work. There is no evidence of any bargain made between the parties at any other time, and we cannot receive evidence, that at the very time this agreement was made the defendant contracted to do something more. The presumption, for the protection of parties, must be, that this paper, signed by the defendant, and even witnessed by a subscribing witness, contains all that he at that time agreed to do in relation to this bargain ; and it is not pretended that any subsequent agreement was made. Then, as to the objection that the court had no legal evidence of a written contract, the defendant proves that the plaintiff had admitted it, and that on oath, and that this agreement was for the very matter he was suing upon in this action ; and he produced what the plaintiffs had advanced as a copy of that agreement. It was

not necessary that he should have given the plaintiffs notice to produce the agreement, because they had avowed they were suing upon a written agreement. They did not, to be sure, declare on one, but that was not necessary, and the omission left no ground for inferring, that they would on the trial forbear to produce it in support of their action. The rules of evidence are founded on reason'; and this very relaxation of the rule referred to has been recognized under circumstances similar in effect to the present.

SHERWOOD, J., concurred.

MACAULAY, J.—It appears to me, that in this case assumption lies, but that there was sufficient evidence of an agreement, or a part thereof, being reduced to writing, to render its production in evidence incumbent upon the plaintiffs. I also think, that the restriction of trade, being omitted in the writing, cannot be superadded to it as an additional item of the consideration and agreement on defendant's part; but as the writing was not produced, the court are not in strict legal possession of its contents.—3 Esp. 213. The defendant's proof of the admission of one of the plaintiffs in his affidavit, and by signing an alleged copy of the paper, is sufficient to entitle him to call for its production, and a new trial should be granted, because it was not produced by plaintiff. It does not appear such a mere memorandum, that it may be regarded as not proving any material part of the transaction, and as not affording the best proof of the defendant's agreement.—3 B. & C. 326, 698; 4 Esp. 163; 12 Ea. 327. It purports to be signed by the party charged, to be duly witnessed and accepted by the plaintiffs. The consideration on the plaintiff's part is not specified, but that may be proved otherwise.

It is unnecessary to express any opinion upon the legality or uncertainty of that part of the alleged agreement, as set forth in the sixth count, which relates to a restriction of the defendant's trade. Were it necessary, I should be disposed to think such an agreement legal and sufficiently certain, if it could be proved by parol, and superadded to the alleged written note; but it is not to be overlooked, that not being to be performed within a year, it may fall within the 4th section of the Statute of Frauds, and so be inadmissible, unless

proved by a written note or memorandum, signed by the party to be charged.

Per Cur.—Rule for new trial absolute.

FERRIE ET AL. V. YOUNG.

MCGILL V. STULL.

The court ordered full costs on an assessment of damages upon a cause of action exceeding 30*l.*, but under 40*l.*, it being a case in which the court would have granted a certificate, if there had been a trial. In another it was refused.

On a judgment by default in assumpsit, damages were assessed at 30*l.* odd, and the plaintiff moved the court for an order on the master to tax King's Bench costs, which he could not, pursuant to the ninth rule of court of Easter Term 11. Geo. IV., otherwise obtain. The judge who took the assessment reported, that if it had been a trial he would have certified.

ROBINSON, C. J.—The question now made is, whether the act of 1818 is not wholly inapplicable to assessment; and whether, in consequence, plaintiff has not a right to King's Bench costs, without availing himself of our rule of court. If we think he has, it must be because we think that our rule was made without authority, and if so, we should rescind it; and if so, the plaintiff gets his costs of course. If we are not of that opinion, then in that case we should make an order for King's Bench costs *under our rule*, for the case seems to be one in which King's Bench costs should be recovered.

SHERWOOD, J., concurred as to allowing costs upon the footing of the plaintiff's right, and thought the ninth rule not warranted.

MACAULAY, J., agreed with the Chief Justice.

Per Cur.—Let King's Bench costs be taxed.

In the second case, the damages were assessed on a promissory note for 5*l.* only; and the plaintiff rested his claim to costs solely on the ground, that the statute of 1818 did not apply, because there had been *no trial*, and the judge, therefore, could not certify; and no restraint was put on him by law from taxing full costs, excepting under the ninth rule above quoted, which is in the following words: "It is ordered by the court, that in any action of the proper

"competence of the district court, in which final judgment "shall be obtained without a trial, the master shall tax no "more than district court costs, unless specially authorised "by order of the court, or of a judge in vacation."

ROBINSON, C. J.—There are two questions ; 1. Is it clear that the statute of 1818 does not apply to assessments of damages ?

2. If it does not apply, then have the court not exceeded their power in making a rule to restrain costs to the amount of district court costs ?

Upon the first point I will only now say, since the recent decision (*Jones v. Wing*, supra, p. 36,) that the court have made, that I only concurred with my brothers in that decision, in order that the point of practice might be settled and that the judges might act uniformly on the circuit in granting certificates or withholding them. My opinion has always been, that the statute of 1818, being a beneficial statute in ease of the subject, and intended to confine causes to their proper jurisdiction, might well be extended to assessments as well as to verdicts, considering the footing upon which assessments of damages are expressly placed by the statute of 1822. And I think many instances may be found, of extending the words of a statute more largely than would be done by this construction. I would instance the case of *Jordan v. Cole*, 1 H. Bl. 532, upon the construction of the 19 Geo. III., ch. 70.

However, I acquiesce in the construction which, after doubt and discussion, has at length been given to our statute ; and doing so, I feel it to be the more incumbent upon us to maintain our rule, and to act upon it, if it be not such a one as we had no power to make. If it be, we should of course rescind it. The intention of it is obvious ; abuses had prevailed of taking confessions in the King's Bench for small sums, and suing for small debts, which ought rather to have been brought into the district court ; and under that construction of the statute of 1818, which would allow full costs, unless there be a trial, in judgments upon these cognovits, and upon assessments where no plea was put in, full King's Bench costs were taxed, though the demand might be, as here, upon a full note of hand.

The rule of court is intended to restrain this. The restraint is just; it is for the credit, and, I think, for the advantage of the profession, that it should exist. It is in accordance with the spirit and design of the act of the legislature; and I do not see on what ground it can be questioned, that the court are competent to make such a regulation. It goes only to the *quantum* of costs, not to the right of costs. The King's Bench Act of 1822 gives the judges power in express terms to regulate the former; they have not power to change the law as to the right to costs.

And certainly, the allowing the plaintiff to shew on affidavit any matter that should lead the court to allow him King's Bench costs, affords a convenient and just course as regards the parties.

SHERWOOD, J., considered the plaintiff entitled, as a matter of right, to King's Bench costs; and that having such a right, the court could not, by any rule, deprive him of it. That the legislature alone could so alter the law of 1818.

MACAULAY, J.--I have always taken it to be the understood construction of the act restraining costs, that it did not apply to judgments by confession and default, when final judgment was obtained without a trial, and conceive there is abundant authority to support that construction. But the act of 1822 enables the court to adjust a tariff of fees, so as to extend its application to these cases. They are certainly within the equity of the act, and I have imbibed impressions from judicial authority in England, which strengthen my conviction, that in the rule promulgated on this subject, the court have not exceeded the powers vested in them by law.—*I M. & R. 321; 1 Chit. R. 636; 4 M. & S. 171.*

Per Cur.—Rule absolute.

HARRIS V. HAWKINS.

Where defendant's attorney agreed to accept short notice of trial, provided his witnesses could be got to court in time, and accordingly procured their attendance, and plaintiff did not call on the cause; *Held*, that defendant was entitled to costs for not going to trial pursuant to such short notice.

The plaintiff being late in his proceedings, so that he could not give due notice of trial for the last assizes for the Home District, the defendant's attorney agreed to take short

notice, provided his client could get his witnesses to court in time, and he accordingly subpoenaed them. Before they arrived, and during the assizes, the plaintiff's attorney, not being prepared, told the defendant's attorney he should not try the cause, and he did not. The defendant's witnesses, however, came to court; and consequently a rule was obtained in Michaelmas Term for costs for not proceeding to trial. The plaintiff, in Hilary Term, took out a rule to discharge this rule, on the facts which were shewn on affidavits.

THE COURT were of opinion, that as the expenses of defendant's witnesses had been incurred in consequence of the understanding between the attorneys, that the cause should be tried upon a short notice of trial, which was given and accepted, that it was but reasonable the plaintiff should pay the costs, which were unnecessarily incurred through his failing to go on. And that as if the cause had been tried, and defendant had obtained a verdict, he would clearly have been entitled to full costs, there seemed to be the same reason that he should have them now.

Solicitor-General for plaintiff.

Washburn for defendant.

Per Cur.—Rule discharged.

FISHER V. BROOKS.

The court allows an original writ of *f. fa.* to an outer district to be amended by making it a *testatum*, and an original writ to warrant the *testatum* to be sued out, after the first writ had been placed in the sheriff's hands, and after a motion to set aside proceedings for irregularity without costs, and discharged the rule for setting aside the proceedings without costs.

Judgment had been entered upon cognovit, the venue being laid in the Home District. A *f. fa.* was sued out directed to the sheriff of the District of London, and put into that sheriff's hands.

A motion was made last term by the *Attorney-General*, to set aside this writ for irregularity, on the ground that it was not, as it ought to be, a *testatum* writ, and that no previous writ of execution had been sued out to the Home District to warrant a *testatum*.

Ridout, on the part of the plaintiff, moved to amend the writ to the sheriff of London, and to sue out a writ into the

Home District to warrant the amendment prayed for. The only question with the court was, as to the costs, whether the amendment should be allowed without costs; and whether the plaintiff should not pay costs on discharging the rule obtained by the defendant before the amendment? The amendment was ordered, but the question of costs stood over till this term.

ROBINSON, C. J.—On looking into the several cases which respect amendments of this kind to cure similar irregularities, I think the court may properly allow the amendment, and discharge the rule which the defendant obtained, without subjecting the plaintiff to the payment of any costs, and I think it just to do so. That the court have it perfectly in their discretion to dispose of the matter on such terms as to costs as they may think proper, there is no doubt. The granting or withholding costs in all cases of this kind is clearly in the discretion of the court, and depends upon the view which they take of the particular circumstances of the case.

Now, in respect to this case, as to the merits of this application: the debt is ascertained by the defendant's own confession, and the courts have repeatedly declared, that justice shall not be delayed or defeated for mere slips of this kind.—*Carty v. Ashley*, 3 Wils. 454. They have accordingly constantly allowed of these amendments, and frequently suggested them, in order to prevent vexation and injustice to the parties. And sometimes, when they have even given way to the motion so far as to set aside the proceedings for irregularity, they have done it without costs.—*Atkinson v. Taylor*, 2 Wils. 117.

It remains now to examine by what rule, as regards costs, the courts in England appear to have usually governed themselves in cases of this description; because discretion is not to be exercised arbitrarily, and we should of course desire to conform to whatever the practice sanctions. In *Copperthwaite v. Owen*, 3 T. R. 657, an amendment was allowed in a case similar to this on paying the costs, and the court discharged the rule which had been taken out for setting aside the writ of execution, on the plaintiff paying costs. This, however, is scarcely an authority for making costs a con-

dition, because it was an error brought from the County Palatine of Lancaster, and amendments after error brought stand on a very different footing.

Shaw v. Maxwell, 6 T.R. 540, is an authority in favour of amending in such a case as this without paying costs; and the judgment there, instead of being for a debt confessed, was for damages recovered in trespass. The case of Newman et al. v. Law, 5 T.R. 557, was cited in this last case, as an authority for granting the amendment without costs, and it certainly is strong on that point; and, in my opinion, it fully warrants the granting this amendment, and the discharging the other rule without costs. What Lord Kenyon there says is especially applicable to this case: "the defendant," as his lordship remarks, "ought not to have taken the objection at all." It is a mere matter of form that he insists upon, the omission can be supplied at any time of course; and the taking out a writ into this district is merely throwing costs upon him, which the plaintiff very probably was willing to have avoided. The case of Davis v. Hughes, 7 T.R. 206, bear also on the question, so far as this respects being a judgment by confession.

SHERWOOD, J., concurred.

MACAULAY, J.—It appears from the cases noted, that the allowance of costs is discretionary, and the rule has been recognized and acted upon in favor of their disallowance in this court on former occasions. It may be more reasonable to allow the amendment without costs in this case, as the defendant has taken out and served a rule, calling upon the plaintiff to answer a matter which had been relinquished, and which he did answer at obvious trouble and expense. By allowing the rule to amend without costs, and discharging the whole of the defendant's rule without costs, the spirit of former decisions will, I think, be adopted in this cause.

Per Cur.—Amendment allowed without costs, and defendant's rule discharged without costs.

DOE EX DEM. BOYER ET AL. V. CLAUS.

A lessor in ejectment will not be allowed to release the action. A release by an executor who is also a trustee does not release trustee.

Ejectment for premises in the Niagara District. The case was as follows : Michael Berninger, deceased, devised to his wife and daughter 800 dollars each, *to be paid out of his real estate*, devised by the will, and the wife's legacy being declared to be in lieu of dower, if she chose to accept it. To John Boyer and John Claus, "my executors" hereinafter named, "all my farm and lands which I at present occupy, "situate at Niagara aforesaid, in trust, to sell such part of "the same as shall be necessary to pay and satisfy my said "wife and daughter the said sum of 800 dollars a-piece, and "afterwards to convey the remainder of the same farm and "lands to my sons hereinafter named. Provided always, "that if my said sons shall give good and sufficient security, "by bond or otherwise, to my said executors, for payment "of the said sum of 800 dollars a-piece to my said wife and "daughter, then my will is, that my said trustees and exe- "cutors shall forthwith convey the said farm and lands to my "sons John Berninger, Abraham Berninger and Isaac Ber- "ninger, and their heirs, as tenants in common. I give and "bequeath all my personal estate to my said wife and sons "and daughter, to be equally divided between them. And "I hereby appoint the said John Boyer and John Thomas "executors of this my will." Will made in 1820, proved in 1820. John Berninger, the eldest son, is dead since his father's decease, and Abraham Berninger, the second son, is now the heir-at-law of the testator. This ejectment was brought on a double demise of Boyer and Thomas, the executors and devisees in trust, and of Abraham Berninger, the heir-at-law. The defendant claims under John Berninger, the first heir of Michael Berninger, who, in 1825, mortgaged the premises to one Cox, and afterwards in the same year joined with Cox in a conveyance to the defendant in fee. These deeds were registered respectively, in July, 1825, and November, 1825. The will was never registered till July, 1832, after the ejectment was brought. The plaintiff proved the will, and relied upon the title under the demise of the devisees in trust. The defendant at the trial objected that

the will was invalid for want of registry, according to the provisions of our Registry Act ; but the objection was overruled by the Chief Justice, who tried the cause, on the ground, that as the testator held immediately by grant from the crown, his was an unregistered title, and, therefore, the provisions of the Registry Act, which renders the estate of the devisee liable to be defeated by a conveyance from the heir, being registered in such a manner as to entitle it to precedence, has no application to this case. The will does not require registry to make it valid as a will, though an omission to register is attended with the peril to the devisee of losing his estate by a conveyance to another from the heir but not in the case of an estate which had never, before the making of the will, been made the subject of an entry in the county registry.

The defendant next produced and proved two papers, one executed by John Boyer, one of the lessors of the plaintiffs, since the assizes commenced, in which he certifies that he never authorised this ejectment, and further, "that he "never acted in any way as executor to the estate of the "testator, and does not intend to act as such in any manner "or form whatsoever," And the other executed by John Thomas, the other lessor of the plaintiff, since the assizes commenced, by which "in consideration of 5s. paid by de- "fendant, he remised, released and discharged the defen- "dant from all actions whatsoever, and more particularly "from this ejectment ;" both which papers were under seal.

The Chief Justice directed a verdict for the plaintiff, notwithstanding these papers called releases, leaving the effect of them to be urged hereafter, stating that one only was a release, the other being simply a declaration, that the lessor of the plaintiff's signing it had not caused the action to be brought ; that if a release by one of several lessors of the plaintiffs, being a joint tenant with the others, could stop the action from proceeding, it should have been advanced before this stage of the proceeding, when it could not avail unless by plea of *puis darrein continuance* ; and if such a release could not be so pleaded, it could not avail at all. And the jury found for the plaintiff.

Draper, in Michaelmas Term, obtained a rule nisi for a

new trial, on these grounds : 1. That the release ought to have been admitted at the trial to stop the plaintiff's recovery.—2 Chit. R. 270. 2. That the estate given by the will is devised upon a condition, and could not vest until that condition is complied with. 3. That John Berninger, under whom defendant claims, was *cestui que trust*, or rather one of them, as well as heir-at-law, and defendant claims under him in both capacities. 4. That an estate devised upon a mere trust, without any beneficial interest, does not vest without their assent to the devise; that no evidence of assent has ever been given in this case. On the contrary, it is admitted that both the trustees always refused to act as executors, and have abstained from acting in regard to the estate.—Cro. Eliz. 80; 11 Ea. 288; 2 Vent. 198; 1 Vent. 128; 3 Co. 26, (b.)

The *Solicitor-General* shewed cause, and further contend-ed, that, at all events. Abraham Berninger, on whose demise plaintiff has declared in one court, is one of the *cestui que trust*, and on his demise the action could be sustained. The court delivered their opinion this day.

ROBINSON, C. J.—I am of opinion that there is no ground for disturbing this verdict, and that it was properly rendered for the lessor of the plaintiff. It is clear, upon reflection, that the plaintiff's recovery could not be barred by the papers put in and relied upon as releases. These were executed long after the parties were at issue, and in fact after the assizes commenced. Anything that would avail on a plea *puis darrein continuance* in other actions, might and ought to be so pleaded in ejectment, but a lessor of a plain-tiff cannot release the action.—4 M. & S. 300.

2. It would be certainly absurd to call the estate devised by the will to the lessors of the plaintiff's, an estate upon condition, in a sense that it is a condition precedent that must be performed before the estate can vest. It is exactly otherwise; by the words of the devise and the reason of the thing, the devisees are to sell the estate to raise the money.

There can be nothing in the third point, for clearly John Berninger takes no present legal estate under the will.

4. It cannot be said that any evidence was given that Boyer, one of the devisees in trust, rejected the trust. We

have merely his certificate (which is nothing) "that he has never acted or intended to act as executor, in any manner or form whatever." And if this could be admitted as that kind of disclaimer which would prevent the estate vesting, still Thomas, the other devisee in trust, far from declining to act as trustee, has signed an instrument expressly for releasing the action, which is a direct interposition as the owner of the estate, and evidence of the acceptance of the trust. And this being as if the other trustee had effectually disclaimed, the whole estate would have devolved upon Thomas.—4 Leon. 267; 3 B. & A. 31. Indeed the statute 21 Henry VIII., ch. 4, provides for the case, and it is decided, that that statute being beneficial in its object, is to be extended as well to cases where the executors take an interest as devisees, as where they have by the will a mere naked power to sell.

SHERWOOD, J., concurred.

MACAULAY, J.—It seems established, that the lessor of the plaintiff cannot release the action, however the court, upon his application, may interfere to stay proceedings. Consequently the release of one of the lessors of the plaintiff, as urged at Nisi Prius in this case, is unavailing. As to the disclaimer advanced in the argument, the land in question is devised to the two trustees, as trustees and not executors, and of these trustees one disclaims, not as trustee, but as executor, and the other does not disclaim at all, on the contrary, he acts so far as to release this action. And even if the other joint trustee had effectually disclaimed, it would seem the whole estate would then go to the co-tenant, and not to the heir of the testator or to the *cestui que trust*, as contended.

Per Cur.—Rule discharged.

TULLY V. GLASS.

A *certiorari* will not lie to an inferior court—the district court for instance—after verdict, although the court may be of opinion, that evidence, which has been rejected by the judge below, should have been received by him on the trial of the cause.

Trespass for taking personal property. The suit was brought in the district court at Perth, the damages being

laid at 15*l.*, and after a trial and verdict for defendant, a new trial was granted. The general issue was the only plea on record. At the second trial, the defendant contended the goods in question were his property, and that he had a right of possession at the time he took them, and offered evidence to sustain this defence. The judge who presided refused the evidence, as inadmissible under the general issue, and the plaintiff obtained a verdict.

Draper, in Hilary Term, moved for a writ of *certiorari* to remove the proceedings into this court, for the purpose of obtaining their judgment on the legality of rejecting the proffered testimony; stating at the same time, that if the court would intimate their view of the law on this head, there was no doubt but that the judge below would be governed by it.

The court ordered the matter to stand over, to consider the propriety of granting this application, and now delivered their opinions *seriatim*.

ROBINSON, C. J.—A *certiorari* ought not to go after verdict; but so far as it is desired to obtain the opinion of the court, I have no objection to say, in respect to the point which occasions doubt in this case, that defendant could, in my opinion, give in evidence under the general issue, that the goods, which he was charged with taking as a trespasser were his own goods, and that he could adduce any evidence necessary for the purpose of proving them his own, because shewing the goods to be his own, decidedly disproves the trespass, and supports the plea of not guilty, when the taking of the goods is the only trespass complained of.

SHERWOOD, J.—It is my opinion, that a writ of *certiorari* cannot issue in a civil suit after trial, as such a proceeding would be against the provisions of the statute, 43 Eliz., ch. 5. I incline to think the usual course in the inferior courts of record in England, is for the party offering the evidence to tender a bill of exceptions, which, being received by the judge, is tacked to the record, and after final judgment in the court below, a writ of error is brought into the Court of King's Bench, where the disputed point of law is ultimately determined. The same course in my opinion, might be pursued here, for a writ of error, I think, lies from a judg-

ment rendered in the district court to remove the record into this court for any error in law, precisely in the same manner that a writ of error lies to the Court of King's Bench in Westminster Hall, from the inferior courts of record in England.

I do not feel warranted to express an opinion on the principal question, unless the proceedings in the inferior tribunal are regularly before the court, although, from my present impression, there appears to be little or no difficulty.

MACAULAY, J.—It has been decided in this court, that the *certiorari* is a matter of course, without motion, subject to be disregarded, according to the state of the proceeding in the courts below, under the English statute; but as the inferior courts are not by statute bound to allow or obey the writ after verdict, the court would be acting indiscreetly at least to issue a writ upon a direct application of this kind, which they could not enforce. Adopting the facts suggested in the affidavit filed on this application, as the actual state of the case, I have no hesitation in saying, I think they would form matter of defence under the general issue. The defendant may contest the right of property under that plea; he asserts property in himself, and does not justify the taking of property admitted to have been in another.—1 B. & C. 143, 267; 7 D. & R. 709, 769; 5 B. & C. 206; Doug. 749; Tidd. 389, 405.

Per Cur.—Certiorari refused.

THOMPSON V. LEONARD.

Where a debtor on the limits, on a writ of *capias ad satisfaciendum*, issued out of a district court, was brought by his bail for surrender to the sheriff, who refused to receive him except at the gaol, but gave a certificate, which was taken away by the bail, that the gaoler might receive him, and the bail did not then surrender him, but some time after, (the debtor, in the meantime, having gone off the limits,) gave him up to the sheriff, who kept him in close custody until he was discharged by an order of the judge of the district court: *Held*, that an action for false imprisonment would not lie against the sheriff, for taking the debtor on the second surrender, the first having been conditional, and the condition not complied with, and the escape having been negligent and not voluntary.

A defendant is entitled to a writ of *capias ad satisfaciendum* for the costs of his defence.

Trespass and false imprisonment against the defendant, sheriff of the Niagara District. Pleas: 1. Not guilty. 2. *Actio non*, setting out a judgment recovered against plain-

tiff, by one Robert King, in the Niagara District court. A *ca. sa.*, sued out by King, returnable 9th January, 1832, endorsed for 29*l.* 8*s.* 9*d.*, by virtue whereof defendant, as sheriff before the return of the writ, took and arrested plaintiff, and detained him, &c. And that afterwards, for allowing plaintiff the benefit of the gaol limits, defendant took security, and took from two persons named a bond, whereupon defendant allowed plaintiff the limits, until his bail on 2nd February, surrendered him to defendant, who received and took him to gaol, and detained him, &c., for the said time, &c., which are the trespasses. 3. *Actio non*, setting out as before, down to the defendant's going upon the limits, and then stating that plaintiff voluntarily surrendered himself into defendant's custody in discharge of his bail, whereupon defendant received him, &c., which are the same trespasses, &c. 4. *Actio non*, setting out as before, the judgment, *ca. sa.* and arrest, and then pleading a negligent escape on the 1st February, fresh pursuit and recaption on the 2nd of February, and a subsequent detainer.

Replication takes issue on the first plea. To the second, protesting the judgment and *ca. sa.*—*de injuria*, and without the residue of the cause, &c.

Similar replication to the third and fourth pleas, and issue joined.

At the trial before the Chief Justice at the last assizes for Niagara, the plaintiff proved, that he was brought to gaol in February by the deputy-sheriff, and remained in custody then till discharged by an order from the judge of the district court of that district. Against this order, as evidence, the defendant's counsel objected, that it purported on the face of it to be made out of the Niagara District; that it was not apparent on the face of it, that the party granting it was judge of the Niagara District Court, and that it did not shew the ground of the discharge. The defendant proved—the judgment writ of *ca. sa.*—that defendant was bailed and on 23rd December brought by his bail to a house in Niagara, to the sheriff to be rendered; that defendant refused to receive him excepting at the gaol, but gave a written authority to the gaoler to receive plaintiff from his bail, as having been surrendered by them; that the bail on some account abandoned their intention of surrendering him, but took away

this order with them, on which plaintiff now relies, as proving that the sheriff had then received him as a prisoner. No other steps were taken until February, when a formal render was made to the deputy-sheriff, by whom the defendant was conveyed to gaol. The jury found for the defendant ; and in Michaelmas Term last *E. C. Campbell* obtained a rule nisi to set aside this verdict and grant a new trial. He objected,
1. That there was a variance between the bail-bond produced and the one set out, and that the condition of the bond produced was not in conformity with the Gaol Limits Act.
2. That the render in December was valid ; and that having been subsequently set at large, the taking him into custody, and confining him in February, was a trespass.

Draper, shewed cause, and contended, that the plaintiff, should have new-assigned ; that the defendant justified one trespass, and could apply his justification to the plaintiff's case ; that the finding of the jury, on the non-efficacy of the first render was conclusive, and was warranted by the evidence ; and that the sheriff was only doing his duty, in taking plaintiff into custody the second time.

Cur. Adv. Vult. To-day judgment was given.

ROBINSON, C. J.—I did not in this case see, that any ground for granting a rule nisi was made out, and I do not find that any legal or just exception to the verdict has been shewn on the part of the plaintiff.

The action is against the sheriff of the District of Niagara, for trespass and false imprisonment. He justifies the imprisonment by pleading, that the plaintiff was a debtor in execution, who had obtained the privilege of the gaol limits on giving security ; and that he was afterwards surrendered by his bail, and was thereupon received by him as sheriff, and detained in custody as the law required. And this defence he made out clearly in evidence, except, that it was objected, on the part of the plaintiff, that he (the plaintiff) had, on a former occasion, been surrendered by the same bail in the same action, and been suffered to go at large, and that, under such circumstances, he could not be again surrendered, as alleged by the defendant. This was met, by shewing from the plaintiff's own witnesses, that what he called a previous render was in fact nothing more than this,

that the bail had intended to surrender him, and took him for that purpose to the sheriff, who was ready to receive him, and made out and delivered to him a written authority to the gaoler to receive him from his bail, as having been surrendered by them ; but that, in consequence of the present plaintiff remonstrating with the bail upon the unfairness of such a proceeding on their part, as he had given them security to indemnify them, they abandoned the intention of rendering him, and neither took him to gaol, nor made any use of the written authority which the sheriff had given them. That authority, to be sure, in words, acknowledged that the prisoner had been rendered, but it was given in good faith, upon the understanding, that the bail, who brought the prisoner before the sheriff, meant to perfect their intention, and deliver him up. They changed their mind, but nevertheless carried away the sheriff's certificate, and wish now to produce it as conclusive evidence against him, of a fact which they know is not true by reason of their own subsequent conduct. It is an unreasonable attempt, to say the least of it. I look upon this imprisonment as legal, notwithstanding any thing that took place before, as proved in evidence ; but then the plaintiff seemed to rely that he had proved it to be *prima facie* illegal, because he shewed that he was afterwards discharged from this imprisonment by order of the judge of the District Court of Niagara, from whom the *ca. sa.* emanated. But, in the first, the order itself seems to be rather illegal, for it purports to have been made in the Home District, and not in the District Court of Niagara, nor by a judge of that court ; and, in the next place it is an order simply directing the discharge of the debtor, from which no inference is to be drawn, that he had been illegally detained. For all we know, he may have been discharged because he paid the debt, or because his creditor had made default in paying the weekly allowance.

It was objected at the trial, that the condition of the bond was not in conformity to the statute, and that the bond was therefore illegal. That was an objection that appeared upon the face of the pleadings, and which the court, therefore, need not determine upon as a ground of nonsuit, and would not entertain, unless they felt it to be clear and unanswerable.

Neither would I now give any effect to it, upon a motion for a new trial. If there were anything in the objection, it should have been received in another shape. There is no merit in it, when urged by the plaintiff as an objection to the defence in this action, since he received the benefit of the bond and enjoyed his liberty under it, and ought not, therefore, to question its validity, when it is advanced as a protection to the officer who accepted it from him and acted under it.

All advantage that the plaintiff can shew himself strictly entitled to must of course be conceded to him, but, in my opinion, he should receive no assistance from the discretionary indulgence of the court, for his proceedings have been vexatious. He suffered no real injury or injustice from the sheriff, for he broke the limits, and did not pay the debt; and yet, because he imagined he had some legal ground for treating his imprisonment as illegal, he splits a cause of action which has no equity or merit in it, and sues the deputy-sheriff for receiving and the sheriff for keeping him. Whereas, if there really was any cause of action, the sheriff was responsible for receiving as well as for keeping, and an action against him would have afforded all the remedy the party was entitled to.

SHERWOOD, J., concurred.

MACAULAY, J.—The objection of variance cannot, I think, prevail. The bond for the limits is stated in the plea to be conditioned, “that if the plaintiff should be and remain “within such limits of the gaol of the District of Niagara as “aforesaid, without subjecting the said defendant to any “action or suit for *an escape* by the said Robert Kay, his executors, administrators or assigns, then the said obligations “to be void.” The condition itself is, that “if plaintiff should “be and remain within *such limits as aforesaid*, so appointed “and determined as aforesaid, without subjecting the *sheriff of the said District of Niagara* to any action or suit for an “escape from the gaol or limits of the gaol of the said district by the said Robert Kay,” &c. The bond is not the foundation or gist of the defence, but is stated as inducement thereto, and many cases shew the distinction between matters of *substance* and of *description*, and that when matter

of substance only is stated, literal proof is not requisite and I conceive the present to be a case of the former kind, in which the *substance* only is alleged, and I think the proof sufficient in substance.—9 Ea. 157; 4 B. & A. 435; 5 Ea. 409; 1 B. & A. 699; 2 Camp. 525.

The statute 11 Geo. IV. ch. 3, provides that it shall be lawful for any person, having given security to the sheriff for any prisoner to enjoy the limits, to *surrender* such prisoner into the *hands* of the sheriff, or his deputy or gaoler, upon which the sheriff is required to deliver up the security that the bail may be discharged. The sheriff certainly cannot be bound to accept a prisoner whenever the bail may happen to meet him, or choose to offer him up. It would seem more reasonable, that they should be at the risk and trouble of delivering him up at the gaol from whence he was enlarged, if required by the sheriff. In the present instance, at any rate, the surrender in December was inchoate, and did not effectually take place. The sheriff's certificate was given conditionally, and the condition was not complied with. The bail, consequently, continued responsible, and might, at any future period before an escape, take and render their principal. If, however, before such render, he escaped from such limits, I think it would no longer be a matter of right in the bail to render him, being fixed with a forfeiture of their obligation. But, at the same time, the sheriff might accept the party from them, as he might after a negligent escape himself retake him on fresh pursuit. Consequently, the imprisonment in February is justified under the second or fourth plea. The plaintiff was not duly rendered by his bail till February; and if, by reason of the escape, they could not render at that time, the sheriff might himself retake, the escape being negligent and not voluntary. According to the evidence, he was not surrendered in December, and if he was not duly rendered in December, he was retaken by the sheriff as on a negligent escape; so that, one way or the other, the defence is sustained. I deem it supported under the second plea.—Barnes, 373; 5 T. R. 25; 1 Show. 174; 3 Co. 52; Cro. Jac. 657; 1 Lev. 330; 2 T. R. 126.

Per Cur.—Rule discharged.

CLARK ET AL. V. MALLERY.

Where a defendant, against whose property an attachment has issued, puts in special bail, the court will order a *supersedeas* to the attachment.

An attachment had issued against the defendant's estate, real and personal. After his property had been seized he came in—put in and perfected special bail, and gave, or rather tendered, the plaintiff's attorney a bond according to the statute; and, on affidavit of these facts, the court ordered a writ of *supersedeas* to the writ of attachment to issue on the return of rule nisi, which had been taken out by *Sullivan*.

KETCHUM V. POWELL.

A note of hand was lodged with an attorney for collection. The defendant, being judge of a district court, agreed to give him credit for his fees from time to time, which were to be made up quarterly, and endorsed on the note. The attorney received credit to an amount sufficient to pay the note, but only endorsed a small portion, and after promising to endorse the whole, ultimately refused and subsequently absconded; *Held*, that in an action brought by the owner of the note, the defendant could not avail himself of the credit so given to the attorney, as a payment.

Assumpsit on a promissory note. The plaintiff put it into the hands of a practising attorney of this court for collection. The defendant, being judge of the Home District Court, agreed with his attorney to give him credit for fees as judge, until it should equal the amount of the note; the defendant would not, as was proved, have given this credit, had not the attorney agreed to endorse the amount on the plaintiff's note quarterly, as the accounts were to be rendered. The attorney endorsed the amount of the first quarter, being about 8*l.*, and continued to receive credit for several quarters, till the amount equalled the balance due on the note. The attorney, was then on some account, unconnected with this suit, confined in gaol, and defendant sent to him, adjusted their account, the amount of which was admitted, and requested the attorney to endorse it on the note, which he promised to do, stating that the note was at his office; but, on being applied to a second time, he refused, alleging that it was not in his power to settle the amount with his client at that time. The note had been in his hands upwards of a year, and no suit was instituted upon it. The plaintiff sub-

sequently obtained it from the attorney, and brought this action upon it, allowing the endorsement for 8*l.* to stand good, but refusing to recognize the act of his attorney any further.

A verdict was rendered for the plaintiff, with leave to defendant to move to enter a nonsuit, if the court should be of opinion that the defendant ought not to recover; and *Draper* moved accordingly on a former day in this term.

Sullivan shewed cause.

ROBINSON, C. J.—The facts of this case cannot, in my opinion, sustain an argument; and it is not surprising, that the cases cited have a very remote bearing upon the question which has been raised. Some of them apply merely to the enquiry, in what cases the agent or servant has authority to receive payment, and others to the question, who shall bear the loss, when the servant or agent, having authority to receive payment, has misapplied the money after it got into his hands, or has taken a bill or note on behalf of his principal, which has turned out to be unproductive. Neither of these questions occurs here. The attorney never received payment of this note in money, and took no security which has been found unproductive. His being an attorney of this court does not, in my opinion, take the case out of the general principles of law which respect payment made to an agent. It used to be questioned whether an attorney of the court, employed to collect a debt, had authority to receive payment. By the civil law they had not, but the officer, to whom the process of execution is committed, can. But it has been long admitted, that by the law of England payment to an attorney employed to collect a debt is payment to a client, and more especially here, when the attorney had in his hands the note on which the money was due.

But this sum of 6*l.* 10*s.* has not been paid, unless it can be allowed to be a payment binding on the client, that the attorney did one time promise, that if credit were given to him by the defendant for certain fees, as they should accrue due in the course of the attorney's practice in the district court, he, the attorney, would allow the amount of what he should owe for such fees to be from time to time endorsed as payments on the note. Credit was given, and to a sufficient amount to cancel the note, but the attorney did not carry his

agreement into effect—he gave no discharge upon the note, but refused to do so. What might have been the effect of the arrangement if he had done so need not be considered. But to hold the client to be bound by this agreement, of which he had no knowledge, and to have lost the debt by a mere contemplated arrangement of that kind, would be contrary to all reason. It is true, the attorney, on the ground of this note, obtained credit; but, without reference to the payee, there was no ground for supposing that he would consent to let his demand rest, until a district court account should be run up to meet it; and, in my opinion, the defendant must reasonably be taken to have incurred the risk of his sanctioning or not sanctioning such a compromise. What was there to prevent his calling at any time, and taking back his note which had never been put in suit? In this case, doubtless all was meant fairly, and the subsequent misconduct of this attorney, unsuspected perhaps by either party, has occasioned the difficulty; but to allow attorneys thus to confound their own transactions with those of their clients, would open the door to practices, that would be alike injurious to the reputation of the profession, and the interests of suitors.

The client, by placing this debt in the hands of his attorney, reposed in him a confidence which warranted the other party in paying him the money; but such an arrangement as was made required a confidence of a different kind to be reposed, and if loss has been suffered in consequence, it must fall upon him who reposed that confidence, which is not implied in the general relation of attorney and client. After obtaining credit for these fees, the attorney, unless he were a prudent man, might not return cash in hand to pay them, and then the loss must fall on a person ignorant that any such credit had been given.

SHERWOOD, J.—I think the agreement of the attorney is not binding on the plaintiff in this case. He was authorized to collect the note, but not to pay his own debt with it, or to use it to obtain pecuniary credit for himself. Authorizing a man to do an act in a particular way implies a negative that he should not do it in any other way, if any consequence would ensue from doing it in one way which might not from

doing it in the other.—Co. Lit. 258, b; 2 P. Wms. 19. The attorney would have been more able to pay the amount of the note to the plaintiff, had he received the money from the defendant, than he would have been after paying his own debt with the note. The authorities (6 Ea. 538; 1 M. & S. 148; 11 Mod. 88; 13 Ea. 432; 3 Stark. 16,) cited by the counsel for the plaintiff, appear to me to shew the defence set up here is untenable. When the plaintiff employed the attorney to collect the note, he employed him in the usual manner an attorney-at-law is employed—to collect the money due on the note, with an implied power to do all such subordinate acts as are usually incident and necessary to effectuate that purpose; such as suing out processes, granting receipts, or discharging the suit upon payment of the debt and costs, and for all common purposes in a transaction of this sort, but nothing further.

The only remaining point to be examined is, whether the assent of the plaintiff to the indorsement of 8*l.*, recognizes and adopts the agreement of the attorney respecting the other proposed indorsements, so as to destroy the plaintiff's right of action on the note. I think it does not. The attorney himself refused to make the indorsements while the note was in his hands, and therefore the agreement, in point of fact, was never carried into effect by him; but, if it had been, it would not have been a satisfaction of the debt, without actual payment of the money, because the agreement was not within the scope of the ordinary authority of an attorney who is merely employed to collect money, and there is nothing in this case to take it out of the general rule of law.

MACAULAY, J.—Upon numerous authorities, and upon the principles upon which the relation of client and attorney subsist with regard to the debtor as well as *inter se*, I am of opinion, that the arrangement made by defendant with the plaintiff's late attorney did not discharge the note in question, and that, therefore, the plaintiff is entitled to recover.—2 Vern. 127; 4 B. & A. 270; 2 Lord Ray, 930; Doug. 624; 1 T. R. 62, 710, 4 T. R. 119; 1 Bl. 8; 2 Sal. 442.

HOLMES V. SPENCER.

Where A. sold land to B. for 225*l.*, and B. sold it to C. for the same sum, and C. sold to D., and it was agreed between A., C. & D., that D. should pay A. who thereupon discharged B. who discharged C., and A. agreed to take from D. land in payment of 200*l.* of the purchase money, and took D.'s promissory note for 25*l.*, the residue, but having subsequently borrowed 95*l.* of D. instead of receiving at once a deed of the land in payment of the 200*l.*, he took a bond, that a deed should be made to him on the re-payment of the 95*l.* by instalments, but having made default in the payment of these, he abandoned the bond and notes given by D., and brought an action against B. for the 225*l.*, as money paid to his use ; *Held*, that the action could not be maintained, A. having lost his remedy on D.'s bond through his own default, and therefore having no right to make B. pay the money.

Assumpsit for money paid, and upon an account stated. Plea, non-assumpsit. The plaintiff having sold and conveyed some land to one Harrington, the latter was indebted to him 225*l.*, balance of the purchase money, how secured not appearing in evidence. Afterwards, Harrington sold the land to one Coleman, but it did not appear whether any conveyance had been executed, and Coleman became indebted for this purchase to Harrington in 225*l.* Coleman afterwards sold the land to defendant, and it was agreed between plaintiff, defendant and Coleman, that 225*l.*, part of the last purchase money, should be paid by defendant to plaintiff, and that plaintiff should thereupon exonerate Harrington of so much. Harrington was not present at this arrangement, but it was assumed that Harrington, if released by plaintiff would discharge Coleman ; so that, by the sale to defendant, Coleman in effect paid his debt to Harrington by procuring satisfaction of Harrington's debt to plaintiff. The defendant agreed to give plaintiff a lot of land in Lansdowne, at 200*l.*, and 25*l.* in notes of hand. The notes were accepted by plaintiff in satisfaction of 25*l.* The plaintiff afterwards borrowed 95*l.* of the defendant, and to secure it, instead of taking a deed from defendant of the lot in Lansdowne, he accepted a bond for a deed, conditioned, that upon paying the sum he owed by certain instalments. This bond he did not pay, and so lost the benefit of the bond. In support of his claim he contended, that he was deceived in the value of the land, it being a bad lot ; and that the notes given him proved unproductive ; that he, therefore, had a right to reject both bond and notes ; that the contract, not being in writing, could not be enforced ; and that the first instalment under

the bond not having been paid when due, the plaintiff had consequently lost his remedy in law, for the land to be conveyed by the defendant. The jury found for the plaintiff; and in Michaelmas Term a rule nisi was obtained for a new trial, to which *Sullivan* shewed cause. The case stood over from Hilary Term, and judgment was this day given.

ROBINSON, C. J.—I am of opinion that there should be a new trial in this case; and cannot conceive upon what ground it can be supposed, that the plaintiff has a claim upon defendant for money paid to his use. The plaintiff, having failed to repay the money borrowed by him of the defendant, has lost his bond, or rather his remedy upon it; that part of the consideration, on which he advanced 225*l.* to Coleman, has therefore failed, but from his own default, and he cannot ground on that default a right of action against Spencer to compel him to pay money. This may seem a hard case on the plaintiff, but not harder than many that may occur, in consequence of the failure of parties to observe their own agreements, and which courts of law cannot alleviate. As to the land being bad (if he could have compelled a conveyance of it), and the notes being unproductive, there is certainly not such evidence as could sustain an action, on the ground of total failure of consideration entitling the party to rescind the agreement for fraud. There is no evidence here of a payment of money by the plaintiff to the defendant's use, on which an implied assumpsit would arise. To lay any foundation for a claim, the plaintiff was driven to go into a history of this whole complicated transaction, that the result might, in its consequences, establish a claim which otherwise would not be apparent. Then, having the whole case necessarily before us, we see that the money was not to be paid by the defendant to the plaintiff, but land and notes, the latter of which he got, and the former of which he would have got, if he had not lost it in effect, by making it the object of a subsequent, distinct transaction.

SHERWOOD, J., concurred.

MACAULAY, J.—I am unable to discover any legal principle, upon which the plaintiff can sustain an action against the defendant, either for money paid, laid out and expended at his request, or upon an account stated, and, therefore,

think a new trial should be granted without costs.—5 B. & A. 228 ; 4 B. & C. 163 ; 3 T. R. 180 ; Lord Ray. 928 ; Chitty on Contracts, 184.

Per Cur.—Rule absolute.

BANKER V. GRIFFIN.

A plaintiff cannot take a step in a cause founded on the Attachment Law, until the three months allowed for the defendant to put in bail have expired.

This was a case under the Attachment Law. *Baldwin* took a variety of objections to the plaintiff's proceedings, which it is unnecessary to recapitulate, as the court gave their decision upon one only. And it was held by THE COURT, that a debtor is allowed three calendar months from the first publication by the sheriff of the notice mentioned in the second section of the act, to relieve himself from the sequestration of the property seized, before ulterior proceedings can be legally taken against him.

Bidwell for plaintiff.

Baldwin for defendant.

Per Cur.—Proceedings subsequent to the attachment set aside.

WARD V. SKINNER.

A bail-piece may be entitled of a term preceding that in which the *care.* is returnable, but a bail-piece must state in the margin the district from which the process issued, with that in which the bail is taken, as thus, "Testatum from the Home District to the Niagara District."

Draper moved to discharge a rule which had been served on the sheriff of Niagara, requiring him to bring in the body of the defendant in this case, which rule had been sued out on the 7th of February last.

The defendant had been arrested on an *alias testatum ca. re.* from the Home District, returnable the first day of Hilary Term. Bail was put in conditionally at Niagara, on the 17th December, 1832, before a commissioner ; the bail-piece was entitled *Niagara* District, of Michaelmas Term, 3 Wm. IV., conditioned to render to the sheriff of the Home District. An affidavit of justification and of due caption were

also made before the first of Hilary Term, and on that day they were all filed in the proper office at Niagara.

Sullivan contended, that the bail must be justified and allowed, before the sheriff could let the defendant out of custody, as it appeared this *alias* writ was sued out *pendente lite*, which made bail to the action necessary in the first instance. And that the erroneous title of the term and of the district made the bail-piece a nullity.

ROBINSON, C. J.—I think the sheriff, according to the exigency of our statute of 1822, is bound to take bail before the return of the writ, if offered by a defendant arrested on process issued *pendente lite*, and may and ought to discharge the defendant without waiting till the term, and consequently before, according to the practice, bail can be perfected and allowed. The sheriff of course having a discretion not to accept insufficient bail, and remaining responsible for their sufficiency, and for their becoming bail in a regular manner, by justifying in term after the return of the writ.

In allowing the defendant to remain at large during the interim, the sheriff, in my opinion, has done nothing wrong, and therefore if it be shewn, that since the return of the writ bail has been put in and perfected, the rule on the sheriff to bring in the body should be discharged *as now prayed*. As to the objections to the term and the venue stated in the bail-piece, it was in fact made, that is, the recognizance was entered into in Michaelmas Term, and before the return of the writ. That bail may be put in before the return of the writ seems now clearly held in England; and if it were otherwise here, the defendant would have no alternative but to remain in close custody, in cases where he has been arrested *pendente lite*, because the bail to be given by him must be bail to the action.—8 T. R. 456.

Being put in here in Michaelmas Term, it is correctly entitled of that term.

But the title of the district in the margin is certainly an irregularity.—2 B. & P. 516; 1 Ea. 603; 7 T. R. 96. The court, particularly in the case in 1 East., say, that bail, put in irregularly in this respect, is in fact no appearance, and that the plaintiff might proceed against the sheriff. On that ground, therefore, I am of opinion, that this application must fail.

SHERWOOD, J., concurred.

MACAULAY, J.—The act of 1822, authorising an arrest pending the action under an *alias ca. re.*, requires the bail taken to be bail to the action. It would have been most expedient perhaps, if a party so arrested should from and after the arrest be regarded as a prisoner in custody, after the return of the process as in ordinary cases, and so not entitled to be enlarged, without perfecting bail and obtaining a *supersedeas*. But the act above referred to does not authorise the justification of bail before a judge in vacation, unless the party be held in prison after the return of the writ. And, as it would be unreasonable that the sheriff should hold the defendant arrested in vacation until the ensuing term, when only bail could be perfected, and a *supersedeas* be regularly obtained, it seems the safest course to give literal effect to the act, and to hold, that upon giving bail to the action, the sheriff may enlarge the party, remaining responsible of course as on original process, if such bail be not regularly put in, and if expected to, duly perfected. In this case, bail was put in before the return of the writ, as it might be—the enlargement was therefore no escape. The bail-piece was filed, and notice given on the return-day of the writ, which was in sufficient time. The bail-piece was properly entitled of the term of which put in. There seems no objection to the place in which put in and filed, and the only remaining question is, whether it is so far defective, in having “Niagara” in the margin, as to entitle the plaintiff, without excepting to it, to adopt the present proceedings against the sheriff. If not helped by the condition of the recognizance, I think the irregularity such, as would entitle the plaintiff to treat it as a nullity.—3 Moore, 76; 2 Bl. 1061; 3 M. & S. 532; 1 Chit. R. 537; 2 Taunt. 67; Barnes, 63. And it seems to me that it is fatally defective. Bail before commissioners is to be entered as directed by Rule 8, Will. III. The officer is an officer of the court, and when the bail-piece is filed it is as if taken in court. The present bail-piece on the face of it appears as upon an original *ca. re.* into Niagara, and the recognizance is consequently inconsistent with it, and apparently irregular—one or other must be bad. They should be consistent. The bail-piece should have been entitled thus:—

"Testatum from the Home District into the Niagara District." If an alias, it should be described as "Alias testatum," &c. I think the rule on the sheriff should not be discharged.

Per Cur.—Rule refused.

BALDWIN AND QUESNEL V. RODDY.

A writ of *certiorari*, under the 19th Geo. III., ch. 70, may issue in this province for the purpose of removing a cause from the district court into this court.

Baldwin moved, under the 19 Geo. III. ch. 70, to remove this cause from the District Court of the Home District into this court, in order to obtain an execution into another district. The court took time to consider the question, whether that statute comes within our general adoption of the law of England, and applies in this case. The opinion of the court was this day given as follows :

ROBINSON, C. J.—This statute seems designed in England to supply a defect which parliament occasioned, when they took away arrest from inferior courts in cases under 10*l.* Such at least seems to have been the motive which induced the British Parliament to legislate on the subject ; but, having given their attention to it, they did not, in the statute which they passed stop short of a general remedy for the inconvenience which had hitherto prevailed. They did not leave plaintiffs, who had obtained judgments for sums above 10*l.*, without the benefit of the statute. It would have been consistent with the recital in the 4th sec. of the statute if they had done so, because it seems to be their intention to give a power of getting at the person and effects of a debtor wherever they might be found, in those cases where the inferior court had not the power of resorting to arrest in order to compel satisfaction ; but the enacting words go farther than the preamble would lead us to anticipate, and the statute does in fact allow the proceedings in all cases in inferior courts of record, as well above as under 10*l.*, to be removed into the superior courts, in order that execution may follow the person and effects of the debtor, wherever the process of such superior court may extend.

It is a reasonable and good provision, general in its nature ;

not confined as to locality, not confined to certain courts, or to any amount of judgment, nor incumbered with any forms or requisites inapplicable to the nature of our courts. It is a power given to all his Majesty's courts at Westminster, to enforce the judgment of all the inferior courts of record in England, in all cases in which the latter have jurisdiction.

Our statute 34 Geo. III., ch. 2, gives to this court "all such powers and authorities, as by the law of England are incident to a superior court of civil and criminal jurisdiction." Now, since the passing of 19 Geo. III., it is incident by the law of England to courts of superior civil jurisdiction to issue process of execution upon judgments of inferior courts of record.

It was not incident to them at common law, but I cannot deny this court all such powers as depend upon the statute law of England, without contravening the principle upon which the superintendence of this court has been exercised in a multitude of cases since its foundation, and most beneficially for the subject.

In every case of the kind, the question, whether a statute has force here or not, must rest on reasons and principles to be considered in reference to such statute in particular. I see no satisfactory reason on which we can reject this. It is true, that the particular inducement to its passing, as set forth in the statute, does not apply; that may be said with respect to much of the statute law civil and criminal which we daily act upon. The parliament shewed, in the statute which they passed, that they perceived an evil beyond that which they set forth, and they made a provision, general in its nature, and expedient upon grounds of policy and convenience, which applies as much here as in England. There are other provisions following the fourth clause, which are beneficial amendments of the law of England as applied to inferior jurisdictions generally, much to be desired here, and, in my opinion, equally applicable here as in England, and, therefore, of force here under this statute, on the same principle that many of these statutes have been always conceived to apply.

I cannot see why we should not consider this statute in force, when we look at the general terms of our statutes, 34

Geo. III., and 2 Geo. IV., ch. 1, and I am of opinion that the *certiorari* should issue. If, in the construction given to this statute in England, the court had held that it applied only in cases under 10*l.*, I should be inclined to think it not in force here, at least, that is my present impression.

SHERWOOD, J.—With respect to the first, second and third sections of this statute, which prohibit the arrest of a debtor for a less sum than 10*l.*, their operation has undoubtedly been suspended in this province, for they are contrary to the provisions of our statute 2 Geo. IV., ch. 1, which allows a debtor to be held to bail for 5*l.* The fourth, fifth, and sixth sections of the statute 19 Geo. III. extend to all inferior courts of record in England. The fourth section recites, "For as much as persons served with process issued "out of inferior courts, where the debt is under 10*l.*, may, in "order to avoid execution, remove their persons and effects "beyond the limits of the jurisdiction of such courts," and enacts, "That in all cases wherein final judgment shall have "been obtained, in any action or suit in any inferior court "of record, it shall be lawful for any of his Majesty's courts "of record, upon affidavit made and filed therein of such "judgment being obtained, and of diligent enquiry having "been made after the person or persons of the defendant or "defendants or their effects, and of execution having been "issued against the person or persons or effects, as the case "may be, of the defendant or defendants, and that the per- "son or persons or effects of the defendant or defendants are "not to be found within the jurisdiction of such inferior court, "to issue writs of execution," &c. &c. The fifth section directs, that no writ of error shall issue to an inferior court when the damages are under 10*l.*, unless the person suing out such writ of error shall give security by recognizance, to prosecute his writ of error with effect, and to pay the damages, debt, and the costs of the judgment be affirmed. The sixth section prohibited the removal of any action before final judgment from an inferior to a superior court, when the cause of action does not amount to 10*l.*, unless the defendant enters into a recognizance for payment of the debt and costs, in case judgment should pass against him.

I think the parts of this act which have not been virtually

suspended by our provincial statutes, are in force in this province ; and it appears to me the last three sections have never been suspended. Whenever there is a suit-at-law between two parties, and either continues to proceed against the other by compulsory process, the subject of such suit remains a matter of controversy between them. By our provincial act, 32 Geo. II., ch. 1. resort must be had to the laws of England, for the decisions of all matters of controversy relating to property and civil rights. I think the word "decision" in this statute is not confined in its legal meaning, to the mere rendering of final judgment, but embraces the full remedy afforded by the laws of England, till the matter of controversy actually terminates in satisfaction to the injured party, such as proceedings upon writs of error, &c. The statute in question would be as beneficial in its effects here as in England ; and, as it is not an act of mere local expediency, but general in its operation, I incline to think the legislature intended to introduce it into this province, and therefore think proceedings should be allowed to take place under it in favour of the plaintiff.

MACAULAY, J.—Having further considered the statute in question, respecting which my sentiments were partially expressed in the case of *Gregory v. Flanagan*, 2 MS. Reports, Draper, 660, in this court, I am of opinion that it is an act of mere local expediency, and however useful in itself, or applicable to the district courts established in this country, still the local and peculiar causes and objects which induced the enactment, are such as deprive it of that general operation which is contended for, and which alone could give it force of law in this province, in relation to the inferior courts subsisting here.

MACAULEY, J., *dissentiente.*

Per Cur.—Rule granted.

MACKINNON V. JOHNSON.

It is sufficient, if pleas be filed in the proper office, to prevent a plaintiff signing judgment, though they have not been served.

Action on a recognizance of bail. The declaration was filed last November, and the defendant obtained time to plead

till the first day of Hilary Term, and served the rule. In the meantime the plaintiff's attorney had signed judgment, but withdrew it. On the first day of Hilary term, the defendant left his pleas in the Deputy-Clerk of the Crown's office, which were filed the 5th day of February.

Final judgment was signed, for want of a plea, on the 18th of February, the plaintiff treating the pleas filed as a nullity, because no copy had been served. The defendant's affidavits, in addition to the facts, state that he has a *just* and legal defence; and that he has a good and legal defence. Motion to set aside this judgment and execution for irregularity, or to be allowed to defend on payment of costs.

The court held the judgment clearly irregular; and the Chief Justice, in delivering judgment, said, that the filing of the pleas (although copies were not served) was sufficient to prevent the plaintiff from signing judgment as for want of a plea, under the express words of our statute.

Per Cur.—Rule to set aside the judgment and execution absolute.

THOMPSON V. BREAKENBRIDGE ET AL.

Where in trespass *quare clausum fregit* and *de bonis asportatis*, the defendant makes title in his plea and gives colour, the plaintiff cannot reply generally as to a plea of *liberum tenementum*; but must traverse the title alleged or reply specially, and to reply to a plea justifying the removal of goods, as encumbering the defendant's close, that the defendant was not lawfully possessed, or *de iuris* generally, when the defence pleaded rests upon a title or possession, not connected with the personal conduct of the parties, is bad.

Trespass *quare clausum fregit*, and a common count for trespass and *asportavit* of goods. To the first count the defendant pleads several special pleas, one of which is to this effect: that one James B., before the time when, &c., was seised of the dwelling house in which the trespass is alleged to have been committed, and by his last will devised one undivided third part thereof unto one A. B., to hold during her natural life, and devised the said dwelling house to R. B., one of the defendants, his heirs and assigns, subject to the life estate of A. B. of and in the undivided third part. That the said J. B. died, whereupon A. B. became seised under the will of an undivided third part of the dwelling house, and the defendant R. B. of the other two third parts, with remainder

in the part devised to A. B., after her death. That A. B. and R. B. entered and were possessed of their respective estates, and that the plaintiff, under colour of a demise from J. B., in his lifetime, entered into the premises in the lifetime of A. B., and was possessed of the dwelling house; and that defendant, in his own right as to two parts, and as bailiff of Anne for the third part, broke and entered the dwelling house, and removed the goods which were encumbering the house, doing no unnecessary damage, &c. To this plea the plaintiff replies, that the dwelling house, at the time when, &c., was not nor is the dwelling house and freehold of the said A. B. and R. B., in manner and form as the defendants have in their plea alleged, &c. The defendants demur specially to this replication, assigning for cause, that the plaintiff, admitting the seisin of J. B., and the devise by him, merely denies that A. B. and R. B. were seised of the freehold as alleged thereby, raising an issue of law, not of fact.

The defendants have pleaded another special plea, in answer to the count for taking the goods, viz., that certain premises, which he specifies, were in the possession of the defendant R. B.: and that because the goods of the plaintiff were encumbering the premises, he did, in his own right and the other defendants as his servants, and by his command, remove them, doing as little damage, &c.. The plaintiff replies to this plea, that the defendant was not lawfully possessed, &c., and that defendants *de injuria absque tali causa*, &c. The defendants demur to this replication, assigning for cause, that it is double, the *de injuria* putting in issue the whole defence, without the denial of the defendants' possession, and that it attempts to put in issue, whether defendants were lawfully possessed, and also whether the goods were encumbering the close; that it is a negative pregnant, and does not deny that they were possessed, which would be sufficient against a wrong-doer.

The case was argued by *Draper* for the plaintiff, and *Sullivan* for the defendant.

ROBINSON, C. J.—It is clear on the authorities, and particularly on some of them (Hard. 317; 10 Co. 10; 1 Lord Ray. 410 1 Saund. 298; Str. 1238; 2. Cro. 682;) that the demurrer to the replication to the third plea is good, on the

ground that it does not directly deny the title pleaded, taking issue on some fact of it as pleaded, but, admitting all the facts, offers issue on an inference in law, that, notwithstanding these, the defendants were not seised, which is not an issue for a jury. As to the demurrer to the replication to the fifth plea, it is clear that on that demurrer the defendants also are entitled to succeed. Many cases shew, that to offer an issue upon the allegation, that defendants were lawfully seised, is bad, and it is also contrary to the principles of pleading to reply *de injuria* generally, when the defence pleaded rests upon a title or upon a possession, and the legal consequences depending upon that possession, and not connected with the personal conduct of the parties.—² Saund. 295; Willes, 99. There is another objection to this replication, so far as it respects the defendants justifying under a command, which it is not necessary to go into. Judgment is given for the defendants on both these demurrs.

SHERWOOD, J., concurred.

MACAULAY, J.—It seems that the replication to the third plea is bad. It is the common replication to a plea of *liberum tenementum*, which the plea replied to is not. The plea makes title, and gives colour, and it was incumbent on the plaintiff to answer the title alleged in the defendants, or at least to reply specially. The present replication puts in issue the seisin of the devisor and devisees, and is too large, according to the principles or rules laid down in Crogarty's Cases, 8 Co.; 1 B. & P. 76, and subsequent authorities.

The cases also seem to shew, that the replication to the fifth plea is likewise bad. It is double, or first special and then general. It first denies the possession, and then puts in issue the possession.—³ Lev. 243; Fortes. 329. Whether the goods encumbered the close; whether the defendant removed them from thence or seised them elsewhere, &c. The replication is vicious on the above ground, independent of the consideration, that some of the defendants justifying by command of others, the command is not answered specially, but is involved in the general effect of *de injuria*.—¹¹ Ea. 65, 451.

Per Cur.—Judgment for the demurrer.

**IN RE ELECTION OF MEMBERS OF THE BOARD OF POLICE
FOR THE TOWN OF BROCKVILLE.**

The court will not grant a mandamus to try an election of corporate officers chosen under the Brockville Police Act ; but will leave the parties contesting the validity of such election to their remedy by information in the nature of a *quo warranto*.

Baldwin moved, on a former day in term, for a mandamus, or a rule nisi for a mandamus, to the bailiff who held the election of the Board of Police of the Town of Brockville, to return two individuals who had the majority at the close of the poll on the day on which by the statute the election is required to be held. It appears that the election was duly commenced on the day required by the act, being the first Monday in April, and was adjourned, by the bailiff presiding, from day to day, till the third day, when two persons, who were in the minority on the first day, having the greatest number of votes, were returned. It was sworn that the election might (in the opinion of those making the affidavits) have been concluded the first day, as the whole number of votes might as well have been taken then if they had offered themselves, as not, there being ample time in one day to have polled them all. *Baldwin* also prayed leave, in case the court were of opinion that no mandamus should issue, for leave to file an information in the nature of a *quo warranto*.

ROBINSON, C. J.—Upon the authority of Rex. v. Bankes et al., 3 Burr. 1454, I think we are bound to refuse the mandamus. Whether the election can be continued beyond the first day, is a question in which opposite opinions may, for all that we know, be very sincerely entertained by the persons favouring the respective candidates, or by the candidates themselves ; and there is no ground for looking upon it as a mere colourable election, made without any imagination of right. If this be so, as I think it is, the parties have a way open to them, by *quo warranto*, to try the validity of the election, in a more solemn manner than through the summary interposition of this court.

SHERWOOD, J.—It appears clearly, by the current of authorities, that if, upon all the circumstances, a corporation election be doubtful, the court will not grant a mandamus, because it would be necessary, in such case, to try the legal-

ity of such election.—Str. 1003; 4 Burr. 2008. The proper mode of trying the legality of such election is by information in the nature of a *quo warranto*, under the provisions of the statute 9 Anne, ch. 20, by which a corporation officer *de facto*, illegally exercising the duties of the office, may be ousted by the judgment of this court.

The election now in question was made under the provincial Act 2 Will. IV., ch. 17. It commenced on the first Monday in April, and was adjourned from day to day till the third day inclusive, and the objection to the proceeding is, that it could not be legally adjourned, but should have been closed on the first day. I find, in Com. Dig., 5th ed., title Franchise, F. 21, a note by Mr. Hammond to the following effect, and he cites Kyd on Corporations, 44, for an authority for the position : “at common law, when the day “appointed by the constitution of a corporation for the elec-“tion of a new mayor was the day the old one went out of “office, the latter had no power to adjourn the election from “that to a subsequent day, unless he had a power of holding “over ; and in fact, if he had made such an adjournment, an “election completed at the adjourned meeting would have “been void ; but this inconvenience seems to have been “remedied by the statute 11 Geo. I., ch. IV. The princi-“pal intent of it, indeed, was to enable corporations to proceed “to an entirely new election, and it does not expressly give “authority to the mayor to adjourn an election begun and “not completed on the charter day ; but the words seem “general enough to comprehend this case, and the court will “make a liberal construction of them, as the inconvenience “arising from an election not completed, is as great as that “arising from a total omission.” I think the corporation established at Brockville essentially differs in its constitution from the generality of chartered corporations in England, where the election is to be held before the principal officer of the corporation. No member of the corporation at Brockville presides at the election of officers, but it is held by a bailiff, who is appointed for that purpose in each of the wards, and the members of the old board are expressly authorised to continue to exercise their duties till a new board was formed this year. I think as liberal a construction should be made

of the statute law here as in England, and am, therefore, of opinion the late election of corporation officers in Brockville was legally adjourned to a subsequent day, if such a step were necessary for the completion of the election. The bailiff is a public officer, and was in the legal execution of his duty at the time he adjourned the election ; and as nothing appears to the contrary, I think it must be presumed the adjournment was necessary for the completion of the election, rather than the reverse of that proposition. I am of opinion, therefore, that no mandamus or rule nisi should issue on this application, and see no ground for applying to this court for leave to file an information in the nature of a *quo warranto* on the statute 9 Anne, supposing the bailiff had a legal right to adjourn the election.

MACAULAY, J., concurred with the Chief Justice, intimating that in his present view the election might be adjourned *bona fide*.—7 Mod. 195 ; Hard 27 : 1 M. & S. 702.

Per Cur.—Mandamus refused, but leave given to file an information in the nature of a *quo warranto*.

UNGER V. CROSBY.

The defendant has the same time, viz., eight days, to plead to a new assignment as to a declaration.

This was an action of trespass *quare clausum fregit*. The defendant pleaded *liberum tenementum*, and thereupon the plaintiff new assigned, and, at the expiration of four days from the filing and serving his new assignment, signed interlocutory judgment for want of a plea. A motion was made by *Small* to set aside this judgment for irregularity with costs ; and *Washburn*, for plaintiff, contended that only four days were allowed by the English practice, and we had adopted that practice, consequently the judgment was regular. Sed,

Per Cur., the defendant has in England the same number of days to plead to a new assignment that he has to plead to a declaration. The practice is the same here, and the judgment ought not to have been signed till the expiration of eight days.

Per Cur.—Rule absolute.

HAM V. HAM.

The court refused an attachment against a witness for not proving a cognovit, until an order had been made on him to prove it, and he disobeyed it.

The subscribing witness to the execution of the cognovit in this cause refused to swear to the same ; and *Baldwin* obtained a rule nisi against him for an attachment ; *King* answered it by an affidavit, stating that the parties had made a settlement, and the witness, knowing this, refused to prove the cognovit. *Baldwin*, contending this was no answer, moved his rule absolute, but

THE COURT directed that an order should go to the witness to prove the confession, as the cause shewn against his doing so was insufficient. If he disobey this order he will be in contempt, and then an attachment will go as a matter of course.

AVERILL AND HOOKER V. CAMERON.

Where pleas were not entitled in the cause, nor signed by the attorney, but were endorsed with the style of the suit, and the attorney's name, and were regularly filed and served, and the plaintiff treated them as a nullity, and signed interlocutory judgment, the court set the judgment aside.

The defendants' pleas in this case had not the names of the parties in the margin, nor had the attorney signed his name at the foot of them. They were endorsed, however, with the style of the cause, and the attorney's name at the foot of the endorsement, and were duly filed and served. The plaintiff treated them as a nullity, and signed judgment ; and, on application to set them aside, *Washburn*, for plaintiff, relied on a case of *Shore v. Shore* (*a*), decided at chambers. The court, however, after hearing *T. H. Taylor* for defendant, set the judgment aside.

Per Cur.—Rule to set aside the interlocutory judgment absolute.

(*a*) The following note of this case was furnished by Mr. Justice Macaulay :
SHORE V. SHORE.—A plea not entitled, and in the body thereof appeared only the Christian names of the parties. It was endorsed in the cause. Plaintiff's attorney treated it as a nullity, and signed judgment. Defendant's attorney applied to set it aside. Macaulay, J., thought, as the plea was not on the face of it identified with the cause, it was defective.

Vide 1 Chitty's Pleadings, 468 ; 7 East. 33 ; 3 Smith, 243, S. C., more full Relief was afterwards granted on terms.

IN THE KING'S BENCH.

TRINITY TERM, 3 & 4 WILLIAM IV.

Present,—THE HON. CHIEF JUSTICE ROBINSON.

" MR. JUSTICE SHERWOOD.

" MR. JUSTICE MACAULAY.

DOE DEM. McDONELL ET AL. V. McDougall ET AL.

The defendant in ejectment may shew several matters against the plaintiff's right to recover, as that the title was in a third person, and, failing in that, that from his position, with respect to the lessor, he was entitled to a notice to quit, or a demand of possession.

Quære.—See *Maitland v. Dillabough*, 5 U. C. R. 214.

A tenant in fee may surrender his estate back to the king, by act and operation of law, as by accepting a new grant for the same land, or he may surrender by matter of record, but a surrender not of record, or a surrender by record, founded on an invalid title, is insufficient.

Ejectment for ten acres of land in the township of York. At the trial at the last assizes, before the Chief Justice, the lessors of the plaintiff made title under letters patent, dated in June, 1832, which granted that quantity of land to them, in two parcels, to hold in fee upon certain trusts, which are declared in the patent; upon one of which the Catholic Church is situated. The defendant then proceeded to rebut this title by producing the exemplification of letters patent, dated 26th of April, 1819, by which the king granted the premises contained in the patent first produced, together with other lands, to the Hon. William Dummer Powell, James Baby, and John Strachan; and thus shewed, that the king, having divested himself of the estate in these premises in 1819, was not able to make a grant of them in 1832, to the lessors of the plaintiff. The lessors of the plaintiff then produced and proved certain deeds, for the purpose of establishing the fact that the estate had been surrendered to the crown since the patent of 1819. The substance of the various patents, and other instruments produced, was as follows:

By letters patent, dated 26th of April, 1819, the crown granted to the Hon. William Powell, James Baby and John Strachan, and to their heirs and assigns for ever, the front or southerly part of park lots Nos. 1 & 2, and of lot No. 16 in the first concession of the township of York, with their broken fronts, containing 386 acres of land, together with various other parcels of less extent in and near to the town of York, all of which parcels of land are separately described in the patent ; to have and to hold the same, to the said grantees, their heirs and assigns for ever, upon the trusts, and to and for the uses thereafter declared., viz, in trust at all times thereafter to observe such directions, and to consent to and allow such appropriation and disposition of them, or any of them, as the governor, lieutenant-governor or person administering the government of this province, and the executive council therein for the time being,should,from time to time,make and order, pursuant to the purpose for which the said parcels or tracts of land, or any of them, were originally reserved, and to make such conveyance or conveyances, deed or deeds of said parcels or tracts of land thereinbefore granted, or any part thereof, to such person or persons and upon such trusts and to and for such use or uses as the governor, &c., and the executive council for the time being, should from time to time by order in writing appoint ; saving all mines of gold and silver, and all white-pine trees growing or being on the said lands. With a provision in the patent, that if any of the three trustees, or any succeeding trustee, to be appointed as is thereafter directed, shall die, or be desirous of being discharged from the trusts, &c., or become incapable of acting in the same, then the governor, &c.,and the executive council should appoint a fit person to be trustee in his place. And as often as any new trustee shall be appointed, these lands are to be conveyed with all convenient despatch, in such manner and form that every person to be appointed shall be invested with all such powers and authorities, and may in all things act, in relation to the premises, in conjunction with the other trustees, as fully and effectually, in all respects and to all intents and purposes, as if he had been originally, by these letters patent, a grantee, to the uses and trusts and for the purposes therein mentioned.

It is also provided, as in other patents for grants of land, that in case of assignment, or of the estate coming by descent to any other person, the assignee, devisee, or heir, &c., shall within twelve months take the oaths prescribed by law, &c.; and that in default of all or any of these conditions, limitations and restrictions, and especially if the grantees, and the survivor or survivors of them and their successors, do not at all times thereafter observe and fulfil the trusts reposed in them, according to the true intent of the grant, then the said grant and everything therein contained shall be null and void to all intents and purposes whatsoever, and the lands thereby granted, and every part and parcel thereof, shall revert to and become vested in his majesty, his heirs and successors, as if the same had never been granted. This patent was recorded 6th May, 1819.

On 2nd December, 1822, the three grantees in these letters patent, by indenture between them, of the one part, and the Rt. Rev. A. M. D., J. B., D. C., A. M. D. and H. J. B. of the other part after reciting the letters patent of the 26th April, 1819, and that the Roman Catholic inhabitants of the town of York had by their petition set forth, that they were desirous to obtain the grant of a piece of land in the said town of York, whereon to build a church and clergyman's residence, and for a burial ground, and prayed that the governor and council, for those uses, would be pleased to grant in trust, to the said parties of the second part, ten acres, or such other quantity as might be deemed meet, of the government reserve adjoining the town of York, in rear of the line of lots laid out on the east side of Parliament Street (being part of the 386 acres granted by the letters patent), or that they might be permitted to purchase the same on such condition as might be deemed expedient; and that the lieutenant-governor in council, by order in council in writing, bearing date the 7th day of February last (1822), was pleased to order that the three trustees, W. D. P., J. B. and J. S., should sell to the parties of the second part, as trustees for the said petitioners, any number not exceeding ten acres, at 20*l.* per acre, of such part of the park or government reserve above mentioned, as might be most convenient for the said petitioners, for the purposes mentioned in the said petition,

leaving it optional with the parties of the second part, as trustees, to pay the purchase money for the premises at the execution of the conveyance, or at any future period more convenient to them, paying at the same time legal interest in advance upon the amount of the purchase money annually, from the date of the said order in council until the same should be paid. And that the parties of the second part, as trustees, had chosen the parcels of land described in the indenture to be conveyed to them, for the purposes aforesaid, at the rate aforesaid, payable when convenient to them, with legal interest in the meantime, according to the terms of the order in council ; it is witnessed, that in consideration of the premises, and as well in consideration of 200*l.* of lawful money, &c., to be paid as aforesaid, as of the sum of 12*l.*, being the yearly interest thereon, from the 7th of February past to the 7th of February ensuing the date of the said indenture, the receipt whereof the parties of the first part acknowledge, and in consideration of the rent-charge, and of the covenants, &c., therein contained, and to be paid and performed by the parties of the second part, they, the parties of the first part, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said parties of the second part, their heirs and assigns for ever, certain small parcels of land, described by metes and bounds in the deed, and containing respectively 5, 2½, 1½, and 1 acre of land, and all being parts of the 386 acres mentioned in the letters patent, together with all easements, &c., and also all the estate, &c.; to have and to hold the said lands unto the said parties of the second part, their heirs and assigns for ever, upon the trusts, and to and for the uses, viz., in trust, and to and for the sole use and benefit of the Roman Catholic inhabitants of the said town of York for ever, as a site of a church, church-yard, burial-ground and clergyman's residence, and as appurtenant to the church now building thereon, saving and reserving the annuity and rent-charge of 12*l.* per annum, to be issuable out of and chargeable upon the said lands, and to be payable on the 7th of February in each year, with power of distress for rent-charge, if in arrear, and providing that on payment of the principal sum of 200*l.* at any time, the rent-charge should cease ; covenant from the parties of

the second part to pay the rent-charge ; covenant from the parties of the first part for further assurance, and a proviso, that if any of the five trustees, taking the estate under this deed, shall die or be desirous of retiring from the trust, or shall refuse or neglect or become incapable to act, then the other trustees shall, by deed or writing under seal, nominate some fit person to supply his place, and that after such appointment, the premises which were vested in the trustee dying or refusing, &c., shall be conveyed and assigned, so as that the same shall be legally and fully vested in the trustee so to be appointed either solely or jointly with the surviving trustee as the case may require, according to the nature of the trust, estate or property, to the uses hereinbefore declared. This indenture is executed by the grantors only, not by the grantees ; and the receipt for the first year's interest is endorsed, but it has not been registered in the county register.

On 12th of May, 1832, by a writing under seal and endorsed on this indenture, George H. Markland (described as a trustee duly appointed in the place of W. D. P.), J. B. and J. S., reciting that the lieutenant-governor and the executive council had been pleased to direct, that the premises should be acquitted of the rent-charge, and that the principal sum of 200*l.* should be released, in consideration of 10*s.* paid to them by the parties of the second part in the indenture (excepting J. B.), release the rent-charge and declare, that the lands in the within indenture mentioned shall thenceforth be held by the Rt. Rev. A. McD., &c., their heirs and assigns, upon the trusts within mentioned, freed and discharged from the annuity and from the principal, &c. This is executed by J. S., J. B. and G. H. M., and is unregistered.

On the 8th of June, 1832, by deed, likewise endorsed on the same indenture, the Rt. Rev. A. McD., J. B., D. C., A. McD. and H. J. B., reciting that the ten acres of land, within granted to the trustees in the indenture mentioned, were inconveniently situated, being intersected with roads, and otherwise not so compact as was desirable for the site of the Roman Catholic church and burying ground, and reciting, that by order in council, bearing date 3rd May, 1832, a grant,

comprising part of the lands within mentioned, and other lands adjoining thereto, was ordered to be prepared, to the Rt. Rev. A. McDonell, the Hon. James Baby and Alexander McDonell, Esq., upon the surrender of the land within mentioned, which arrangement the trustees were desirous of carrying into effect for the benefit of the said church, and they thereby (in consideration of 5s. acknowledged to be paid) grant, surrender and yield up unto his majesty, his heirs and successors, the premises in the indenture mentioned, "together with all the estate, right, title, interest, claim, "property and demand whatsoever either at law or in equity "of them, the said Rt. Rev. A. McD., J. B., D. C., A. McD. "and H. J. B. of or to the same, &c., to have and to hold the "same, &c., unto his majesty, his heirs and successors, to "the only proper use, &c., of his majesty, his heirs and suc- "cessors for ever." This deed, thus indorsed, is executed by the five grantees in the indenture of 2nd of December, 1822, and is not registered in the county register, nor in any other manner enrolled or recorded.

By letters patent, dated 15th June, 1832, after reciting, that the Rt. Rev. A. McD., J. B., D. C., A. McD. and H. J. B., lately stood seised of ten acres of land in the township of York, upon part of which a Roman Catholic church hath some years since been erected, and which land was held by them upon trust for the use of a Roman Catholic congregation in and about York, as a church-yard and burying ground, and as a site for a parsonage house ; and that it had been represented, that the lands so held were intersected by streets and roads, and that it would be more convenient for the purposes aforesaid, if the ground set apart for the uses aforesaid were more compact, whereupon his majesty had been pleased to accept a surrender of the said ten acres, and to grant to the Rt. Rev. A. McD., J. B. and A. McD. the lands in these letters patent mentioned, in lieu thereof, and upon the said trusts ; his majesty, of his *special grace, certain knowledge* and *mere motion*, gives and grants unto the Rt. Rev. A. McD., J. B. and A. McD., their heirs, executors and administrators, two several parcels of land, containing together ten acres, i. e., the one containing six and three-tenths acres, and the other three and seven-tenths acres, both particularly described by metes and bounds, and being

parts of the tract of 386 acres mentioned in the patent of 26th of April, 1819, (embracing the greater part of the ten acres conveyed by the indenture of 2nd December, 1822, to the five trustees, and in particular that part on which the Roman Catholic church is erected, but leaving out other portions of that ten acres, and taking in an equal quantity of the 386 acres, in such form as to make the tract more compact); to have and to hold the lands granted (by this second patent) to the said Rt. Rev. A. McD., J. B. and A. McD., their heirs and assigns for ever, *upon trust*, and to and for the sole use and benefit of the Roman Catholic inhabitants of the said town and township of York for ever, as a site for a church, church-yard, burial-ground and clergyman's residence, and as appurtenant to the church now erected thereon, with a provision for supplying vacancies as trustees die, retire, refuse or become incapable of acting, by appointment of new trustees by writing under the seal of the other trustees, as in the indenture of 2nd of December, 1822. This patent is accorded by the provincial Register, on 5th July, 1832.

The defendants' counsel at the trial took the following objections to the plaintiffs' recovery on the title first shewn : 1st. That the Roman Catholic inhabitants of the town and township of York are created a corporation by the patent, and are capable of holding to uses. The statute will execute the use, and give them the possession and the legal estate, in which case the grantees, the lessors of the plaintiff, cannot recover. 2ndly. If not, the trustees named become a corporation, as the grant is to them and their successors. The king's consent to their creation as a corporation may be taken by implication; in such case they should have demised by deed, and cannot sue as joint tenants. 3rdly. The patent is void, under the Statutes of Mortmain, no license from the crown so to hold being shewn. 4thly. The patent is for the use of the Roman Catholic inhabitants, reciting that a church has been erected thereon. It is to be presumed such Roman Catholic inhabitants are in possession, and they are entitled to a demand of possession. These points were reserved for the consideration of the court above. If sustained, then a nonsuit was to be entered. To the title

set up in answer to the patent of 1819, the defendants' counsel took the following exceptions: 1st. The conveyance of 22nd December, 1822, is void, being against the Statute of Charitable Uses, 9 Geo. II., ch. 35. 2ndly. The Hon. J. Baby is both a grantor and grantee in that deed. 3rdly. The surrender to the crown is void, not being proved to be by matter of record. 4thly. At the time of issuing the second patent, the lands were subject to a rent-charge; the crown, therefore, granted more than it possessed. 5thly. The patent recites a surrender sounding to the king's benefit, but there is no such benefit, and the grant is therefore void, as the king was deceived. 6thly. On the plaintiffs' statement, it must be assumed, that the defendants are the *cestui que trust*, and as they are in possession a demand of possession was necessary. 7thly. Other persons were in possession and erected a church before the patent of 1832 issued. Their possession is to be assumed to be still continuing with the assent of Mr. Baby at least, who was always seised in fee, from the time of the first grant up to the time of the surrender, and since under the second patent. 8thly. No appointment is shewn to have been made by the government, under which the trustees of the patent of 1819 executed the conveyance of 1822.

The case was argued in Easter Term last by *Sullivan* and *Draper* for the lessors of the plaintiff, and *Bidwell* for the defendants. Judgment was given this day as follows:

ROBINSON, C. J.—This case stands before us as a mere question of title, to be determined upon legal grounds. It has presented upon the trial several points which have been since discussed in argument, and others have presented themselves to us since the argument, as inseparably connected with the enquiry, where the legal estate vests in the premises which are sought to be recovered on this ejectment. Taking all the instruments produced into view, we must enquire, where they leave the legal estate in these premises, and whether the title, as to any part of them, is vested in the lessors of the plaintiffs as joint tenants, so as to support the joint demise as laid down in the declaration? I say any part, because if a portion, however small, of the ten acres was so held at the time of the demise stated, the verdict should

be for the plaintiffs, that possession may be obtained of that portion. The first patent (April, 1819), without doubt vested in the Hon. W. D. P., J. B. and J. S., the legal estate in the whole of the ten acres in question. Under that patent, they held it in fee simple, upon certain trusts. It was rather contended, on the part of the defendants, that the patent, providing for a perpetual succession of trustees, had the effect of erecting the trustees thus appointed into a corporation in the manner directed by the patent, and the trustees, taking the land in a corporate capacity, could not make any such conveyance as that advanced (dated in December, 1822), but could only transfer by deed under their corporate seal. We are quite clear this is not so, and that the three grantees took the estate as joint tenants in their natural capacity upon certain trusts, which a court of equity would compel the observance of, but which, in my opinion, cannot be allowed in a court of law to contest the legal estate. Then, with respect to their conveyance, dated December, 1822, it was doubtless executed by these trustees for the purpose of transferring all the estate which they held in the ten acres described in it, to the five persons named as grantees, viz., the Rt. Rev. A. McD., J. B., D. C., A. McD and H. J. B., upon the trusts therein declared. It is objected that the object of that conveyance is one which could not legally be effected in this province, on account of the prohibitions contained in the Statute of Charitable Uses, and that this deed was invalid on that ground. So far I agree with this exception, that I think the trust is very clearly of such a nature as is prohibited by that statute in England. The case of *Doe ex dem. Willard et al. v. Hawthorn*, 2 B. & A. 96, and many others that might be cited, leave no room for doubt on that head; and if that statute were clearly admitted by us to have force in this province, it would then be proper to consider, whether the requisites of that statute had been complied with, without which no such conveyance as it prohibits can take effect. Such an enquiry would shew that these requisites had not been complied with, for it was neither shewn that the conveyance had been enrolled, nor that a full and valuable consideration had been paid at or before its execution. But I discharge my mind altogether

of any question upon this statute of 9 Geo. II., for I do not consider it to be in force here, for the reasons given by the Master of the Rolls in 2 Mer. 156, and which I would more particularly advert to, if the application or non-application of that statute were decisive of this case, but in my opinion it is not so.

There being nothing then in the trust, as I think, to make the deed void, is it otherwise sufficient to pass the estate? The operative words are *grant, bargain, sell, alien, release, enfeoff, convey, and confirm*. It is not attempted to be proved that livery of seisin was given, and there is no ground laid for presuming it. The deed cannot operate as a release to the five grantees, because, with the exception of Mr. Baby, who was seised and possessed under the patent, they had neither estate nor possession for the release to work upon, and they therefore could not take by that form of conveyance. It is clear that this deed must either operate as a bargain and sale or not at all. To make it pass the estate as a bargain and sale it must be enrolled, or it must have received that registration in the proper county register, which is made equivalent to enrolment by our provincial statute.

It is true, that a series of decisions upon the English stat. 43 Eliz. ch. 4, have established that in equity, at least, so liberal an effect has been given to that statute, that it has been taken to aid defects in conveyances for charitable uses, and so much so, that effect is given to such defective conveyances as limitations and appointments, when they could not operate according to the form intended.—1 Bl.R.91. And thus a bargain and sale to charitable uses, which for want of enrolment, could not operate at law as a bargain and sale, has had effect given to it in equity as a limitation or appointment. But we are here considering, in a court of law, the strict legal validity of this assurance, and I am, besides, not prepared to say, that either at law or in equity we could recognize the 43 Eliz., ch. 4, as in force here. The leading object of that statute is to correct abuses and to supply defects in the management of property given or devised for charitable purposes, and the provision it makes to that end is a peculiar one, and such as cannot be carried into effect in this province in the terms of the statute, while, without the

provision, or some substitute for it, it might be dangerous and inconvenient to allow any operation to the statute, in relation to charitable gifts and bequests. I mention it, therefore, only to shew that it has engaged our attention.

This deed, therefore, being left necessarily (as I think) to operate as a bargain and sale, or not at all, it is to be considered, that no evidence at the trial was given of its enrolment or (which is the requisite here) of its being registered. It wants the certificate of registry, which we know in practice is usually endorsed, and no proof on the subject was offered. On the other hand, it is to be remembered, that no objection for the want of registry or enrolment was made at the trial. If it was urged in argument in banc, it escaped my attention; but I am convinced it was not one of the many legal exceptions taken at Nisi Prius. In a case of ejectment, where the defendant has advanced no evidence of right, and where possibly the ends of justice may rather be defeated than promoted, by any interposition against the verdict rendered for the plaintiff, it may be doubted whether the court ought to grant a new trial upon a legal objection not urged at the trial, and an objection of such a nature that it may yet be removed at any time. In deference to this doubt, I think it will be more satisfactory to enquire, how the title would stand independently of this exception, and what will be the consequence if the exception shall prevail. It may be found to be indifferent whether the exception shall prevail or not, notwithstanding the forbearance to urge any objection of this kind on the trial, if we ought to look upon the deed as not enrolled, because it is not proved to be so; then it has no operation as a bargain and sale, and if it can operate in no other form, the estate must still remain vested in the original grantees under the patent of 1819, in which case the lessors of the plaintiffs have no title, and must be nonsuited. I do not see that it can operate in any other manner, unless in consequence of the peculiar circumstance, that Mr. Baby, one of the grantees in the patent, is both a grantor and a grantees in the indenture. And what can be the effect of that? He could take no estate directly from himself; but it has been considered by us, whether, as he was seised under the patent, and so capable of taking by

release, the effect of the indenture might not be to vest in him by release the interest of his two co-joint tenants, in which case he would have been solely seised of the estate, holding the interest of the other two by release from them, and retaining his own interest granted by the letters patent. But we all think the indenture had not this operation. It is certain that a deed may in several respects take effect otherwise than the parties intended.—Touchstone, 82. As, if a grant be made to several, one or more of whom are incapable of taking, those who are capable shall nevertheless take, because that is the plain and direct effect of the instrument, so far as it can take effect, that is, the words operate as they are used, and in the sense in which they are used, though some only take under them. So also a conveyance intended to pass the estate in one form or mode may enure to pass it in another form or mode, in order to effectuate the intention of the parties ; so that here, if the five grantees were capable of taking by release (the intent being clearly the transfer of the estate to them), they would all take by release under this deed ; and its want of power to operate as a bargain and sale would signify nothing, and the end designed would be equally answered. But to convert by construction this intended bargain and sale to five trustees, into a release vesting the whole estate in one of them, would be to deviate from the intention of the parties, as to form, in such a manner as to subvert their intention in substance. In Roe ex dem. Earl of Berkely v. Archbishop of York, 6 E. R. 106, Lord Ellenborough says, “when the intent of parties is ‘apparent to pass a thing one way or another, a deed may ‘be good’ either way, and may enure to divers purposes, “and he to whom the deed is made shall have his election “which way to take it, and may take it that way which is “most for his advantage ; yet there is no case or authority “which says, that if a conveyance cannot operate in the way “intended to pass the estate intended, it shall operate in “another way to pass an estate which was not intended, and “not within the contemplation of the parties.” And though the manner of passing an estate is not to be regarded, yet the intent is to be regarded what *estate* is to pass and to whom. —Cow. 600. When we speak of making this estate pass by

release (by construction), in order to effectuate the *intention of the parties*, we must consider what that intention was. Now it was evidently intended by this deed to vest this estate in five persons, as trustees for a Roman Catholic congregation, one of which was the Roman Catholic bishop, and, as we may assume, the head of that church in this province. It can hardly be supposed, in accordance with the intention (in point of substance) of the grantors, that one trustee, who, for all we know, might be a layman, and not even of that church, should take the whole estate, and remain sole trustee, and, moreover, so far as his acceptance, expressed or implied, is necessary to the creation of the trust, it is not reasonable to infer, that because he may have assented to undertake the trust as one of five, he would have been as certainly willing to undertake it alone. Then, as this deed (taking it not to be enrolled) cannot at present operate in any shape, whatever it may be made to do by enrolment hereafter, a title cannot be derived through it to support this action, and, as the plaintiff is driven to derive through it, in order to shew the crown seised of the estate after the issuing of the first patent which divested it, the lessors of the plaintiffs must of course be nonsuited.

How then would the case stand, if we should feel it right not to entertain now the objection on the score of non-registry, as it was not advanced at the trial, and should consider the estate, which was then intended to be passed by the indenture of December, 1822, as being actually vested in the five grantees? We all think that the writing under seal, endorsed on the indenture and executed by them, dated 8th June, 1832, could not operate to vest the estate in the crown, for the reason urged at the trial, that the king can take only by matter of record, and that on no ground could this attempted surrender be looked upon as matter of record. If the deed had been made matter of record, it would have been to no purpose to consider the objection suggested, that a surrender implies a higher estate previously existing in the surrenderor; and that these tenants in fee could not surrender to the king, inasmuch as the king had, by the patent of 1819, divested himself of all the estate which he had before held. Admitting the objection, which I only do at present

for the purpose of argument, still the deed might have operated as an assurance in another form, but for the objection that it is not matter of record, an objection which would equally apply to the deed in whatever shape it might be attempted to give it effect. If, therefore, this estate has become vested in the crown, it must have been in some other manner than by this deed ; and it cannot be suggested that it has in any other manner than by act and operation of law, arising from the acceptance of the second patent of June, 1832.

Surrender by act and operation of law are expressly excepted in the third section of the Statute of Frauds, which requires in general, that a surrender of an interest in lands shall be by deed or note in writing.

Whether a tenant in fee can surrender to the king may be questioned, because the king having in this case parted with the estate, it may be said that there remains nothing on which a surrender can work, which is a general requisite to this form of assurance, as I have stated before.

Doubtless, speaking of a surrender strictly as a form of assurance at common law, a tenant in fee, restoring his estate to the crown, would not fall within it ; but a distinction I am persuaded exists in the case of the king, and the term *surrender* is applied, though it is said to be an improper surrender, to the case of a tenant in fee restoring his estate to the crown, and, I think, consequently, that a person who has received a grant of certain lands from the crown, by accepting a subsequent grant from the king of the same premises, does in fact by such acceptance surrender his former estate ; that his acceptance is a surrender by act and operation of law, on the same principle that a lessee, accepting a second lease of the same premises from his lessor for a greater or less term, surrenders his first term by act and operation of law.—49 Edw. III., 75 ; Touch. 300-1 ; Co. Lit. 338, (a) ; 5 Co. 11 ; Cro. Eliz. 874 ; 2 B. & A. 119 ; 10 Co. 66 ; 6 Ea. 104.

But still, I think, before the acceptance of a second estate shall be allowed to have that effect, regard must be had to the intention ; and there are these differences in this case : that 1st, the second patent is only of a part, and that a very small

part of the lands granted by the first to the patentees in that grant, and so there can be no implied surrender of the patent thereof to be cancelled. 2ndly. That of the ten acres separated from the other lands in the first patent, and assigned by the indenture of December, 1822, to five trustees, a part only, not the whole, is included in the second patent several small portions being excluded for the reasons explained in the recitals, while, on the other hand, to compensate for those and make the quantity equal (10 acres), other small parcels are included in the second patent, which form no part of the ten acres described in the indenture of December, 1822, but which remain vested in the three grantees in the patent of April, 1819. This latter must have been an inadvertence, and it must have escaped attention, that the crown could by no means be considered seised of these small parcels, and that a title could only be made to them by deed from the three grantees, as the five trustees never held them. The effect of this disagreement in the parcels is, that if the acceptance of the second patent was to work a surrender, it could only work a surrender of some part of the ten acres described in the second patent, and the present lessors of the plaintiff would have part only of what the king intended to grant, while, on the other hand, those parcels of the ten acres described in the indenture of December, 1822, which are not included in the grant made by the second patent, cannot be taken to have been surrendered by act of law, because of them they took no second grant. These parcels, therefore, would remain in the five trustees, and they would thus keep some land which the king imagined he had received as a consideration for the second grant, and which it is evident they intended to give up, while the three trustees appointed by the first patent would remain seised of other small parcels, intended to be granted to the lessors of the plaintiff by the second patent, although it is evident that unless they passed by the patent the whole object of granting it would be frustrated, for the ten acres would be as little compact as at first, and, in reality, neither the king nor the Roman Catholic congregation would hold what they intended. The only effect would be, that the grantees in the second patent would hold a con-

siderably less quantity of land than ten acres, and in four equally detached pieces, while part of the land, which the king intended to grant to them, would remain vested in W. D. P., J. B. and J. S., and the tract which the king was to have in lieu of that would continue vested in the five grantees in the indenture of December, 1822.

Then it is to be further considered, that only three of the five grantees in that indenture are grantees in the second patent. Their acceptance of that patent can have no effect on the other two grantees, so as to work a surrender of their interest, and the consequence is, that independently of the variance from the intention, in respect to the quantity of land granted, the estate in that land would be split in a manner not contemplated by the crown or the grantees, if this patent should take effect ; the three lessors of the plaintiffs, if they should be considered as surrendering their former estate on accepting this patent, would hold thenceforth three undivided fifth parts of part of the land contained in that patent, the other two fifths remaining with D. C. and H. J. B., and of the land which it was imagined the king was taking in exchange, he would be seised in part as the owner of three undivided fifths only, and in part he would have no estate. Upon the authority of those cases which have been decided in respect to surrender by act of law, I do not think we can consider the acceptance of this patent to come within the principle. And whether the indenture of December, 1822, had been shewn to be enrolled or not, the lessors of the plaintiff, upon the case made at the trial, must have equally failed for want of proof that the previous estate of the three original trustees had been effectually surrendered.

If the king had merely granted more land than he was capable of granting, or supposed that more was surrendered than had been in fact surrendered, no false suggestion having been made by the grantees, I do not say that the grant would have been therefore void. I should have been inclined to hold otherwise, upon reason and upon authorities which, however, are not very consistent on this point. I refer to the case of Altonwoods and Lord Chandos' case.—
1 Co. 43 ; 6 Co. 55 ; 10 Co. 66. The king here intended to grant an entire estate, and the effect of the patent could only be to grant three parts in five.

It is to be regretted that the grant of land made by the crown for this religious purpose, should have become the subject of legal contest ; and it is further to be regretted, that the contest which has arisen in respect to it should be prolonged, and rendered more expensive by the omission to observe those usual forms which are necessary to the validity of the several assurances. At the trial it struck me, that the objection to the surrender was well founded in law, and upon the most peculiar consideration it appears to us that it cannot be got over ; but it is a mere legal objection unconnected with the real merits of any dispute that can have arisen as to the due execution of the trust, and one that might have been avoided by the registry of the indenture, and the registry or enrolment in the provincial registry office, or perhaps it would be more prudent to say the registry and the enrolment in the provincial registry office of the surrender indorsed upon it. If the lessors of the plaintiff had done this before beginning their action, they would have done all they could for complying with the well established principle which requires a conveyance to the king to be by matter of record. In taking any steps hereafter for perfecting their title, the trustees should bear in mind that from the defects which have been noticed by the court, it is clear that the second patent cannot at present convey all the land that it assumes to convey—a considerable portion of it never having been conveyed by the three original trustees.

As regards this action, we are of opinion that judgment of non-suit must be entered upon the points reserved.

SHERWOOD, J.—I am prepared to express an opinion upon some of the points reserved, but not upon all ; and indeed it is not necessary for the determination of the suit that all the objections made at the trial should be fully considered and settled at this time. I have found a good deal of difficulty in arriving at a conclusion as regards some of the questions to which I shall presently allude, but as respects the principal point, whether the present action is sustainable, I have no hesitation in giving my sentiments. The objections which I have already considered are the following : 1st, that the Roman Catholic inhabitants of the

town and township of York, are made a corporation by the patent granting lands, for their benefit ; or if they are not, then the three grantees mentioned in the patent are thereby made a corporation. I am of opinion that neither the inhabitants nor the grantees are made a corporation by the patent. There is no evidence to show that they accepted the patent as a charter of incorporation, and it is a well established rule of law, that the king's subjects cannot be compelled, contrary to their own wishes, to become members of any corporation. It was necessary to prove that a majority of them at least accepted the patent as a charter of incorporation, before you could consider the corporation formed. Bagge's case is quite clear on this point. Mr. Justice Yates, when remarking on the same subject, in 4 Burr., emphatically says, "The crown cannot oblige a man to be a corporation without his consent, he shall not be subjected to the inconvenience of it without accepting it and assenting to it."—*I. Rol. Rep. 226*; *4 Burr. 2200*; *1 T. R. 588*; *4 M. & S. 255*. There is also another reason why they are not to be deemed a corporation : the king's consent is wanting, and his consent either expressly or impliedly given, is impliedly necessary for the erection of any corporation, whether it exists by the common law, by statute or by charter. The whole tenor of the patent proves to my satisfaction, that the crown intended to grant the lands to three individuals upon a special trust, subject to the exercise of a power of appointment vested in the lieutenant governor and council, and for no other purpose. The only part of the instrument which seems to imply the possibility of an intended corporation, is the authority given to the acting and last trustee by an instrument under his hand and seal to appoint other trustees to supply the place of such as die, refuse to act or become incapable of acting. This power of appointment of other trustees is extended by the express words of the patent to the heirs and assigns of the last acting trustee, which circumstance is conclusive to shew, that the king could not intend to erect a corporation, because corporation franchises are neither assignable nor descendible. The same remark may be applied to the nature

of the grant itself, which gives the lands to the grantees and their heirs for ever. Lands granted to a corporation can never descend to the heirs of the individuals composing the corporate body, and therefore the crown could not intend to erect a corporation in this instance, because such intention would be contrary to the words of the grant, and the king will never be presumed to intend anything against the established rules of law.

2ndly ; the patent itself is void under the Statutes of Mortmain. I do not wish to be understood as giving my opinion at this time whether the Statutes of Mortmain are in force in this province or not, but I incline to think the patent is not void, even if it were conceded that they are in force. The rule of common law is, that the king's right shall not be barred or restrained by any statute unless he be specially named in it.—Plow. 240. To this general rule there are certain exemptions. It has been decided that the crown is barred by acts of parliament made for the advancement of religious and learning, for making provisions for the poor, and for the prevention of wrong and injustice ; but I think the Statutes of Mortmain do not range within the scope of any of these exceptions.—2 Inst. 681 ; Stra. 516. They originate in national policy, and not in the immutable principle of justice and equity, and are of the same class with the revenue laws, or the statutes passed to regulate the fisheries, or to improve the sea coast of the kingdom. I think it quite clear, from the best authorities, that the king was always entitled by his prerogative to license his subjects to purchase estates in perpetuity, because this right was expressly recognised and confirmed by 18 Edw. III. sta. 3, ch. 3, and long since that time by 7 & 8 Wm. III. ch. 37. Now if the king can license his subjects to convey in mortmain, I think it necessarily follows that he himself can convey in the same manner.

3rdly : the deed of surrender to the crown is insufficient in law to effect a surrender, even if the surrenderors themselves had the legal estate in the premises. I am of opinion that the deed of surrender could not have an effective operation to surrender the lands to the crown under any

possible circumstances, because I think the surrenderors had no estate which they were capable in law to surrender. In the first place, the deed from the trustees, in the patent of 1819, is not registered, and therefore the five trustees had no indefeasible estate of inheritance in the premises, and no sufficient estate in law to sustain an action on that conveyance, and consequently the present action would fail, if the surrender were valid in other respects. If that deed, however, had been registered, I think the surrender of the ten acres of land mentioned in the deed of 8th June, 1832, from the five trustees to the crown, would be invalid. A surrender of lands by the common law, is defined to be the restoration or yielding up of lands to another who has a higher or greater estate in the same.—Co. Lit, 337, b.; Wood Inst. 299. The surrender must be made to a person who has the next estate in remainder or reversion, without any estate coming between. The surrenderee must have a higher or greater estate than the surrenderor, and he must be sole seised of the estate in remainder or reversion. Surrenders must not be made of estates in fee simple or fee tail, nor of rights or titles, only to estates for life or years. It may be said that this rule is applicable to the king's subjects, but not to the king; but in my opinion it is applicable alike to both. When the king grants land to a subject I think the patent may be surrendered to the crown, and a new patent issued for the same lands to the same grantee, but the surrender of the estate in such a case would be effected by the act and operation of law, by the giving up of one patent, and by the accepting of another for the same lands. That case appears to me essentially different from this. If the deed of surrender in this case had been duly registered, I think it would have enured as a bargain and sale, and would have vested the fee simple in the crown, because a pecuniary consideration is acknowledged in the conveyance. The king, it is said, cannot convey by bargain and sale, for he cannot be seised to the use of another.—Bac. 58; but the king may be a cestui que use.—Bac. 60; and he may be a trustee—*I* Cruise, 488; *I* Ves. 450; and I therefore conclude he may take by bargain and sale,

enrolled in England or registered in this province. Such a title would be by matter of record ; the crown would then appear to have an estate in fee in the premises from the date of the deed of surrender, enuring as a deed of bargain and sale, and must be deemed to have been capable of granting it by the patent issued to the lessors of the plaintiff. Upon consideration of the points which I have so far remarked upon, I am of opinion that a nonsuit must be entered in the present action. I also think it proper to take some notice of the preliminary objection, raised by the counsel of the lessors of the plaintiffs, to the mode of defence at first adopted and subsequently claimed by the defendants at the trial of this cause, because it appears to be a question of practice which requires to be settled, owing to the probability of its frequent occurrence in actions of ejectment. The lessors of the plaintiffs opened their case, produced the king's patent to prove the legal estate to be in them, and then closed their case. The defendants were desirous of making a double defence : 1st, that the legal estate was not in the lessors of the plaintiffs but in strangers to this suit ; 2ndly, that admitting the legal estate to be in them, still this action could not be sustained because they gave the defendants permission to take possession, but had never demanded restoration. I am inclined to think the defendants have a right to pursue this course. Ejectment is an action *sui generis*, and although it possesses a strong analogy to trespass, still it cannot strictly be likened to that or to any other action, especially on the pleadings. From the great liberality with which the modern action of ejectment is constantly viewed by the courts, the real parties seem to have a claim at least to equal privileges with the parties in an action of trespass where the defendant pleads several pleas, because the defendant in ejectment is bound to plead the general issue. When the defendant in an action of trespass to real property pleads the general issue, the Statute of Limitations, and a license from the plaintiff, the first plea clearly puts in issue not only the fact of trespass, but also the title ; and the defendant may in the first place attempt to prove the freehold and right of possession

in a third person, and that he entered by his command ; but if he fail in his proof of that defence, I think he may insist on the Statute of Limitations, and if he be unsuccessful on that ground, he may at last prove the license under the third plea. If this was not the case, there would be little or no advantage in double pleading. The defendant in ejectment under the general issue, may prove a license from the lessor of plaintiff to hold possession ; he may also insist on the Statute of Limitations being a bar ; and why should he not at the same time be allowed to prove a title in a third person as he may in trespass ? The defendant in this case offered to prove that they took possession by license of the lessors of the plaintiffs. If that were the fact then they were tenants at will, and the lessors of the plaintiffs must have been cognizant of the privity subsisting between them, and should have disclosed the whole case in their opening. If they had done so, the defendants could not have disputed the title, but must have confined themselves to the sole defence arising from the want of demand of possession. Mr. Adams in his Treatise on Ejectment, 271, states the proof required at the trial when a privity exists between the defendant and lessors of the plaintiff, or those under whom he claims :—“ When a privity exists between the parties to the ejectment, the claimant, instead of shewing his title, should shew the existence and determination of the privity, for a privity will not be presumed to exist without proof, but being proved the presumption is in favor of its continuance. If the defendant has become tenant at will of the premises, the lessor must shew how he became so, and that the will was determined by demand of possession or otherwise.” If a tenancy at will therefore existed between the parties, there was no necessity for the lessors of the plaintiffs to prove their title, but as they chose to do so, I think the defendants had a right to endeavour to dispute it ; and if they failed in that, I see no reason why they should not prove the privity of estate between the parties, and insist upon the want of demand of possession.

The lessors of the plaintiffs, contrary to the usual course of practice, have apparently cast the burden of

proving the tenancy on the defendants, and have at the same time unnecessarily brought their own title in question; but I think this unusual deviation should not have the effect of either depriving the defendants of their ordinary right of disproving the title or of establishing the alleged existing privity of estate between the parties. If the defendants ultimately failed in establishing a privity, the lessors of the plaintiff would recover on the strength of their title, supposing no objections to exist against its validity. It appears to me, that as the defendant in ejectment is compelled to plead the general issue when he controverts the lessor's right of action, justice demands that he should be allowed the same latitude of defence which he might claim by pleading several pleas in an action of trespass brought against him by the same plaintiff respecting the same.

Per Cur.—Rule absolute for nonsuit.

AULDJO v. McDougall.

A general power of attorney to an agent to *sign* bills, notes, &c., and to superintend, manage and direct, all the affairs of the principal, gives him a power to *endorse* notes ; and an endorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain, on shewing who they are, and that they act in that capacity, to vest the note in them, so as to give their endorsee the right of suing upon it.

Assumpsit on a promissory note. Plea : the general issue and notice of set-off. The plaintiff claimed as indorsee to Horatio Gates, James Leslie, and John Fleming, who were described in the endorsement, by them, as trustees and assignees of the estate of the late firm of Maitland, Garden, and Auldjo. The note was given by the defendant to George Garden, one of the partners of that firm. It was endorsed " Pay to the trustees and assignees of the estate of Maitland, Garden, and Auldjo : George Garden, by his attorney, William Maitland." At the trial the plaintiff proved the note ; and, by a commission and interrogatories, proved the firm of Maitland, Garden and Auldjo, to consist of these three partners. He next produced an examined copy of an instrument passed before a notary public, at Montreal, constituting or intending to constitute Messrs.

Gates, Leslie and Fleming, trustees and assignees of their estate on their failure ; and proved by the notary the execution of this instrument, and that it remained in his office as a record, according to the laws of Lower Canada, and that he could not part with it. He also proved, that prior to the endorsement of this note, the defendant knew these trustees and corresponded with them in that character. He also proved a power of attorney, under seal, from George Garden to William Maitland, giving him very general and extensive powers, and among others, "to negotiate, draw and sign, all notes, drafts and bills of exchange, and to do all things whatsoever needful and necessary for that purpose." The defendant's counsel raised several objections to the plaintiff's recovery, which in substance are as follows :

1st. The endorsement to the trustees does not state who they are, and is therefore uncertain and void.

2ndly. The instrument of assignment alleged to have been executed by Maitland, Garden and Auldjo, does not constitute the first indorsees of the note the trustees and assignees of that firm, as stated in the declaration. The instrument itself is void, it not having been executed under the seal of the partners.

3rdly. The power of attorney from George Garden to William Maitland is insufficient in law to authorise William Maitland to endorse the note.

Sherwood, J., who tried the cause, overruled the objections, reserving to the defendant's counsel liberty to move, which was done accordingly in Easter Term last ; and the case was argued by *Draper* for the plaintiffs, and the *Attorney General* and *Bidwell* for the defendant. Judgment was this day given.

SHERWOOD, J.—First objection. The present action is brought by the present indorsee of a promissory note, against the drawer, and the endorsement alluded to in this objection is the one alleged to have been made by the late George Garden, the payee, to Messrs, Gates, Leslie and Fleming, under the description of "the trustees and assignees of the estate of Maitland, Garden and Auldjo." The plaintiff, in this declaration, states that the trustees and

assignees of that estate, to wit, Horatio Gates, James Leslie and John Fleming, endorsed the note to him. The defendant contends there was not sufficient evidence to prove that George Garden intended to endorse the note to the three individuals just mentioned, and therefore the endorsement is null and void, and the legal property in that instrument rests with the personal representative of George Garden, who died before the commencement of this suit. If the evidence satisfactorily establishes what persons are meant by the description of "the trustees and assignees of Maitland, Garden and Auldjo," then the endorsement itself cannot properly be termed uncertain, *Id certum est quod certum reddi potest*. Now, I think the evidence went that length. First, there was the notarial instrument executed in Lower Canada, by the partners of the late firm of Maitland, Garden and Auldjo, by which they proposed to constitute Messrs. Gates, Leslie and Fleming, to be the trustees and assignees of their estate. Then there was a letter from those gentlemen to the defendant, informing him that the debt he owed to the late firm of Maitland, Garden and Auldjo, had been transferred to them as the trustees of the estate, and that George Garden and George Auldjo, the present plaintiff, had been duly authorised to collect the debts of the firm. Then there was a letter on the same sheet of paper, from George Auldjo, the plaintiff, to the defendant, dated the 9th August, 1826, by which he informs the defendant that the trustees had directed him to request payment or security of the balance due the late firm, and at the same time encloses an account against him with that firm. These letters were written to the defendant more than two years before the note was endorsed, and almost two years before it was made, and were produced at the trial by him. Mr. Auldjo, who requested payment of the account as agent of the trustees, had been one of the firm with which the debt had been contracted by the defendant. He himself therefore proved that Messrs. Gates, Leslie and Fleming, the first indorsees, had acted as the trustees and assignees of the estate of Maitland, Garden and Auldjo before the indorsement of the note by the payee; and that

one of the partners of the firm, about the same time, had written him a letter, by which he expressly recognized their right to act in that character, and his own accountability to them as agents. It was also proved by two witnesses, that Messrs. Gates, Leslie and Fleming, the first indorsees, were known as the trustees and assignees of the estate of Maitland, Garden and Auldjo, and that the two survivors of them still act in that capacity. The evidence was given, and no allegation was made at the trial that any other persons acted as the trustees or assignees to that estate, or made any claims to that character ; and I am therefore of opinion that sufficient testimony was given to the jury of those three individuals being the identical persons to whom the note was endorsed by the payee. The counsel for the defendant, however, contended that the law demands a greater certainty than this, to charge any one upon an alleged promise. It must be conceded that the law considers a competent degree of certainty an essential ingredient in all contracts ; but what degree of certainty should be deemed sufficient, must depend upon the exercise of judgment assisted by the established maxims of law. An ambiguity arising on the face of an instrument is called *ambiguitas patens*, and no parol evidence is admissible to restrain it ; but an *ambiguitas latens* which arises altogether upon the application of the instrument, may be explained by *viva voce* testimony, as in the present case, with respect to the application of the first indorsement. As regards certainty in pleadings, Lord Coke says, " there are three kinds of certainties; certainty to a common intent, certainty to a certain intent in general, and certainty to a certain intent in every particular."—Co. Lit. 303, a. But how far this account of the word gives a clear and satisfactory idea of its meaning in each kind, need not be examined in this case. The first kind, namely, certainty to a common intent, is the only one, in my opinion, applicable to written contracts ; because they must be explained by extrinsic evidence when a latent ambiguity exists, but this rule does not apply to pleadings. This distinction between contracts and pleadings seems to be made by Lord Coke : " If a writ

abate for want of it, the plaintiff may have another writ. It is otherwise if a deed become void for uncertainty, for the party may not have a new deed at his pleasure."—11 Co. 121. In another place, it is said, " Purchases are good in many cases by a known name, or by a certain description of a person, without either surname or name of baptism, as *uxor J. S.*, or *primo genito filio*, or *secundo genito filio*," &c.—Co. Lit. 3, a.b. And again, " It is a maxim in law that no distress can be taken for any services that are not put into certainty, nor can be reduced to a certainty, for *id certum est quod reddi certum potest*; and yet in some cases there may be certainty in uncertainty, as a man may hold of his lord to shear all the sheep depasturing within the lord's manor, albeit the lord has sometimes a greater number and sometimes a lesser number there; and yet this uncertainty being referred to the measure which is certain, the lord may distrain for the uncertainty. *Et sic de similibus.*"—Co. Lit. 96, a. I think the same principle embraces the present case. The endorsement by itself is uncertain; but the evidence adduced at the trial renders it certain, at least to a common intent, which in my opinion is sufficient.

As to the second objection: I have already said, the evidence at the trial proved that the first indorsees, Messrs. Gates, Leslie and Fleming, were known in Montreal, whose the note was negotiated, by the description of the trustees and assignees of Maitland, Garden and Auldjo; that they acted then, and that the two survivors of them still continue to act in that capacity, and that the defendant was aware of their acting in that character for more than two years before the endorsement by the payee was made. I have also said, I think it was satisfactorily proved that the payee intended to transfer the note to Messrs. Gates, Leslie and Fleming, by the description he used in the endorsement. By this objection, the defendant contends that these individuals were by law incapable of becoming the holders of the note, because the written instrument, professing to constitute them trustees and assignees, is not a specialty. If it were indispensably necessary to determine how far the written instrument had an effective operation for its intended

purpose, I should require further information by evidence of the civil code of Lower Canada ; for the validity of a foreign contract is usually ascertained by the laws of the country where it was made ; but if its enforcements is sought here, the remedy is according to our own laws.—Cow. 343 ; 1 T. R. 243. The public notary before whom the original was passed, in his evidence, seems to allude to that original as a record filed in his office, and which the law will not allow him to part with at any time. If it be a public record, then I think it shall retain the same character here as regards all acts done under it in that province. In my opinion, however, it is unnecessary to peruse the inquiry any further, because I consider the validity of the instrument to be wholly collateral to the issue in the present action on the note. The only question which appears to me to require a decision, is this : whether the payee endorsed the note to Messrs. Gates, Leslie and Fleming. The indorsement from them to the plaintiff is not at all disputed. That they did endorse the note to them is quite clear ; and these individuals were capable in law to become the indorsers and owners of the note, whether they were legally appointed trustees and assignees of the note or not. Their being reputed and generally known as the trustees and assignees, together with their being in possession of the note is in my opinion enough to establish their legal right to the property. They might have sued upon it in their own names ; and their personal representatives, in case of their decease, must have had the same right of action ; and if they were not trustees and assignees, the note would have belonged to them as joint tenants, for their own use. Whether they were legally constituted trustees and assignees, I conceive to be a question to be adjusted between them and the creditors of the late firm of Maitland, Garden and Auldjo, if any difference of opinion should occur as to the ultimate disposition of the amount of the note.

The third objection would certainly defeat the present action, if it was clearly sustainable, for it goes to prove the non-existence of any legal endorsement from the payee of the note. The extent of an attorney's authority must always

be determined by a consideration of the whole terms of the power of attorney under which he acts. The intention of the principal in making the deed is the true criterion, and that intention must be gathered from the whole context. In the case of *Guthrie v. Armstrong*, 1 D. & R. 248, Abbott, C. J., said, "All instruments are to be construed by themselves and according to the whole of their terms. We are not to look at one single sentence or word in the instrument, but to the whole, in order to find out what the meaning of the party is." In the commencement of the power of attorney in this case, George Garden confers full authority on William Maitland to collect all his debts of every description, and then proceeds in the following manner: "And also from me, and in my name or otherwise, to sign and subscribe all promissory notes, bills of exchange, obligations (notarial or otherwise), acknowledgments, agreements, covenants, receipts, and acquittances, and all other papers and vouchers whatsoever, and also all deeds of bargain and sale, leases and re-leases, and all other conveyances, and generally to do, act and transact, all my business and affairs of what nature or kind soever, and superintend, manage and direct, all my concerns, and to do all lawful acts therein, as fully in every respect as I could do myself."

A power of attorney may either be general, extending to all kinds of business, or special, and merely embracing certain specified duties in its provisions ; but the nature of both is to give the attorney all the authority of the principal, for the purpose of enabling him fully to accomplish those ends which the principal appears to have had in view when he executed the deed. Looking at this power, it appears to me it was intended to be as general in its terms and operation as possible, to enable the attorney, according to the words of the instrument, "to superintend, manage and direct, all the concerns" of the principal, and to do all legal acts requisite to the performance of so extensive a duty. Under this power, I think the attorney had a legal right to exercise his discretion and judgment : and if he deemed it expedient, for the interest of his principal, to sell and transfer the note to Messrs. Gates, Leslie and Fleming, he had

also a legal right to indorse it to them, in the name of his principal.

This is the construction which I feel bound to give to the power of attorney, and therefore I am of opinion the postea should be delivered to the plaintiff.

ROBINSON, C. J., and MACAULAY, J., having been retained in a cause, on the arrangement of which the note sued on in this action was given, and the former having been examined as a witness on the trial, gave no opinion.

Per Cur.—Postea to the plaintiff.

DOE EX. DEM. JESSUP V. BARTLET.

A judgment against an executor to recover *de bonis testaroris*, will warrant an execution against the testator's *lands*, on the return of *nulla bona* to the writ against goods.

Ejectment for lands in the district of Johnstown.

The lessor of the plaintiff's title was derived under a sheriff's deed; the land in question having been sold to her upon a *fieri facias* issued on a judgment obtained by her as administratrix of Edward Jessup, against Alexander Wright, executor of Ebenezer Jessup. The plaintiff, at the trial, produced the letters of administration to Susannah Jessup, an exemplification of the judgment against Wright, the writ against the chattels and the return, the alias writ against the lands, and the sheriff's deed. It appeared there were two writs against lands, but this was shown to have happened in consequence of a demise of the crown intervening between the teste and return of the first writ, which was stated on the record. The defendant's counsel took the following exceptions :

1st. That there was no proof of the death of Ebenezer Jessup.

2ndly. That there was no proof that Wright was his executor.

3rdly. That there was no proof of the letters of administration which were produced.

4thly. That the letters of administration which were produced appear to be granted by the surrogate of the district of Johnstown; that the debt of Ebenezer Jessup, to Edward

Jessup, mentioned in the exemplification produced, appears to have accrued out of the province ; and the debtor, if dead, died out of the province, and therefore the Surrogate Court could not grant administration.

5thly. The judgment is entered against the goods only of Ebenezer Jessup ; and on such a judgment a writ could not be issued against his lands.

6thly. The writ issued against the lands of Ebenezer Jessup in the hands of the executor. No evidence given that the lands in question were ever in the hands of any executor of Ebenezer Jessup.

7thly. There is no sufficient return of the *ft. fa.* against goods ; it being only endorsed "*nulla bona.*"

8thly. No evidence of the delivery of the writ against lands to the sheriff.

9thly. No evidence of a sale under that writ.

10thly. The second writ against lands under which alone a sale, if any took place, void ; another then being in the hands of the same sheriff, not then returned or returnable.

11thly. The sale, if any, void, as it was made after the return day, and no evidence given of a seizure previously.

12thly. The sale of Ebenezer Jessup's land, on the judgment against the defendant, as his executor, of which the exemplification is produced, void.

The case was argued last term, and judgment was this day given.

ROBINSON, C. J.—I can scarcely suppose that it was intended to lay much stress upon the objections urged in this cause, at *nisi prius*, with the exception of one or two. It is objected that there was no proof that Ebenezer Jessup is dead, or that Wright is his executor. But both those facts are established by the judgment rendered against Wright, as the executor of Ebenezer Jessup ; not perhaps conclusively established under all possible circumstance, for judgments may be impeached on the ground of fraud, but the judgment is sufficient evidence of them, so far as proof of those facts is necessary to sustain the title. Another objection is, that there was no evidence of administration having been granted to Susannah Jessup ; but in point

of fact, the letters of administration, under the seal of the Surrogate Court, were produced, and proof of the genuineness of the seal need not be given. It is then objected that under the facts appearing, administration should have been from the Probate Court and not from the Surrogate Court of the district of Johnstown. It is said the note was made abroad ; the debtor died abroad. The note was with Edward Jessup, and was assets in Johnstown. But however that might be, the plaintiff's right to obtain this judgment is ascertained by the judgment itself, which we must regard as valid and subsisting, when thus brought collaterally in question as part of the plaintiff's chain of title. If the plaintiff in that suit had no right of action, there was a time and manner of raising that objection to his recovery.

The next exception is probably the one most relied on, namely, that the judgment to recover the damages to be levied of the goods and chattels of the testator, could not warrant execution against his lands. In the case of *Gardiner v. Gardiner*, Trin. 2 & 3 Wm. IV., the much agitated question, whether real estate could be sold in this colony upon a judgment against an executor or administrator, was decided, after the best consideration we could give to it, in the affirmative. Considering the various opinions which had been expressed on this point by the judges who have preceded us, and considering also that in the very judgment referred to this court was not unanimous, it would be very satisfactory if an opportunity were taken for setting the question at rest by a judgment in appeal ; but in the present case we assume the point to be determined by the judgment given in *Gardiner v. Gardiner* ; and I am the rather strengthened in the opinion which I give in the case, by having seen, in the journals of the House of Commons for 1828, the grounds on which the Imperial Parliament proceeded in passing the declaratory act respecting the sale of lands and tenements under judgments in the courts in India, against the personal representatives of deceased debtors. These appear in the petition for that act, which is printed at length, and which is worth referring to by those who take any interest in that important question. The objection,

I dare say, that was meant to be raised at the trial was not that lands cannot be sold under a judgment against the executor of a deceased debtor, but that this judgment is not entered in such a form as to warrant it.

It is a peculiar point, arising from a state of things that exists, not in England, but only in the colonies, under the statute 5 Geo. II. ch. 7, and in deciding it we must be governed by reason and principle. An execution, we are told by Lord Coke, "is the obtaining actual possession of anything acquired by judgment at law." By the judgment of law in this case, the plaintiff acquired a right to damages in money, and the execution is for giving those damages or that money in possession. This is the substantial object of the execution.

It is probably not intended to be insisted on, that in cases between the original parties to the contract, that is, where the debtor is still living, the judgment ought to express that the damages may be levied from the lands and tenements, and that, without such express authority given by the judgment, an execution against the lands could not go. We know that the whole course and practice of this court is opposed to such an idea; and, besides, in the case of Gray v. Wilcocks, carried to the king and council on appeal, the judgment was general to recover against the defendant, and upon that judgment the decision was, that the plaintiff was entitled to execution against the lands. But this is a judgment against an executor, in which it is necessary to express whether the damages shall be recovered *de bonis propriis* or *de bonis testatoris*; and in this case they were properly and necessarily adjudged to be recovered *de bonis testatoris*. The objection is, that this judgment, to levy of the goods and chattels of the testator, does not warrant an execution against his lands. The execution, it is said, must follow the judgment. That is true; it must not vary from it, for instance, in the amount to be recovered, or in the form of action, or in the names of the parties, for if it did, then such an execution would be without a judgment to support it. There are other cases which decide, that when the judgment is against several, the execution

must be against all of them, and cannot go against one or more, nor against either for his proportion. To depart from the judgment, in any one of these respects, would be to make the execution direct something in opposition to the judgment, and which there is nothing besides to warrant. There is another description of variance which comes nearer to the ground of this exception. In *Buxton et al. v. Mardin*, 1 T. R. 82, the case was, the defendant being an insolvent debtor, the plaintiff, upon a judgment against him, in the general terms of a judgment, took out an execution to levy of the goods, except wearing apparel, bedding, and the tools of his trade, not exceeding 20*l.* in value, that is, he took a special execution upon a general judgment, and an execution that could only be warranted by the existence of facts which nowhere appeared on the record. Here, however the case is very different; the judgment directs the damages to be levied of the goods of the testator; that shews where the property is to be sought; that writ is returned *nulla bona*; then no special circumstances are to be shewn; but, under all possible circumstances, the lands, of which the testator died seised, are equally liable with his goods. It is only necessary to shew his goods liable, and the stat. 5 Geo. II. makes his lands liable immediately, and liable to the same process and in the same manner—the statute declares it; the judgment need not. If we can suppose that the meaning of the judgment was to declare that the money might be made of the goods, but should not be made of the land, it would be an illegal direction, contrary to the statute. We should, I think, intend that the judgment means only to direct a formal compliance with the statute of the province 43 Geo. II., which enacts that execution must first go against the goods, and, upon its return, then recourse may be had against the lands. Here the record follows out the statute: judgment against the executor to be levied of the goods of the testator accordingly—the sheriff returns, there are no goods; this becomes part of the record, and then the effect of the 5 Geo. II., and of our statute combined, is to authorise the same kind of process against the lands.

In Siderfin, 276, upon a judgment in general terms and a *fi. fa.* against goods, the sheriff returns *nulla bona*, but that the defendant is *clericus beneficiatus non habens laicum feodium*; then there goes a *levari facias* to the bishop, *quod de terris et catallis ecclesiasticis levari faciat* the debt, &c. Now there is nothing of all this, in the judgment, which is general, but upon the facts returned by the sheriff the law sanctions the process against the lands. So here, upon the sheriff's return of *nulla bona*, the law, a positive statute, authorises the same process against the lands. So in Chief Baron Gilbert's Treatise on Executions, p. 8, he says "the second process in the king's case was a *levari*; and they made use of the word, because the process was to run against the goods and the profits of the land itself; and herein likewise they inserted the *capias* on the person, because it appears on the sheriff's return, on the summonor's process, that he had no goods to satisfy the debt, and in that case the body was liable by the prerogative of the king," &c.—Vide 1 Roll. abr. 897, 620.

In Gee et ux v. Farr, 1 Lev. 225, judgment in an action upon recognizance of bail, and *scire facias* on that judgment; and the judgment was that the plaintiff should have execution against them according to the form of the recognizance aforesaid; and *ca. sa.* was sued out and executed; and it is especially noted in the case, that though the recognizance was to levy *de terris et catallis*, yet execution by the body is good by the law and usage of this Court.

This bears very directly and strongly upon the present question. It might be more regular and formal that the judgment, when of necessity it mentions the *goods* of the defendant or his testator, in order to show whose assets are liable, should also advert to the *land*, which may ultimately be taken in execution, for the purpose of excluding the conclusion that the judgment was intended to narrow the remedy which the law gives the party, but I do not see that it is necessary; and moreover, it must be considered by us that our judgments in like cases for a series of years have been like the present, and so far as I know never

otherwise ; and yet, doubtless, much property has been transferred under them precisely as this has been.

In respect to the objection which follows this, that execution issued against the lands "in the hands of the executor," which, it is argued, could not be in reason or law, the answer is, that the execution is not in those terms.

With respect to the alleged insufficiency of the return against the goods, the same objection precisely was taken in *Doe ex dem. Crooks v. Updegraves* some years ago, and was overruled by this court. As to the alleged want of proof that the *fit. fa.* against lands was delivered to the sheriff, and that he seized before the return of the writ—the sale being after, (as it is admitted it might be)—these are particulars of which I nowhere find that extrinsic evidence is required to be given. The judgment, execution and deed is the ordinary chain of evidence in such cases. The sheriff recites in his deed the other facts—his conduct implies them ; for if he never received the writ he could not act upon it, and he could hardly have advertised before the return if he had not seized before the return, in so far as seizing is required.

The objection as to the second writ against lands issuing before the first was returnable, is explained, as we understand, by the fact which occasioned its issuing—the demise of the Crown, which is stated in the record, and which led to suing out the alias writ.

SHERWOOD, J., concurred.

MACAULAY, J.—The inference I draw from the late decision of this court, and the principles upon which it is founded, is, that by the statute 5 Geo. II. lands are made assets for the satisfaction of debts, as chattels real—that they are to be regarded in the light of lands devised to be sold for the payment of debts—(in which case, should no one be expressly empowered to effect such sale, the duty, it is said, would devolve upon the executor ; however, in similar devises to raise funds for other persons, the heir-at-law or some other person would be the only competent party). This position is, however, liable to great doubt and question.—Chance Powers, 63.

The proceeds of land would form assets at law, and

something more—namely, assets *quasi personal*. The legal estate descends to the heir or vests in the devisees, subject to be defeated by a sale to satisfy creditors, as takes place in all cases when lands are charged with debts and descend subject to sale for their satisfaction. They are not properly assets in hand, but nevertheless they are personal assets at law, and may well be comprehended under the term chattels. Under that term lands and tenements, a leasehold estate, whether freehold or for years, would be comprehended; consequently chattels real, or lands and tenements, would seem synonymous terms, or of similar import as applied to real estate in the colonies, rendered assets to satisfy simple contract debts by 5 Geo. II. chap. 7. Not being in hand, a judgment restricted to goods and chattels in hand would perhaps exclude the real estate—to embrace which there should be superadded something extending to that fund. Taking 5 Geo. II. and our provincial statute together—the latter prohibiting any writ against lands till the return of process against the goods—I do not see why the ordinary judgment might not first be entered and acted upon, followed by an entry of the return of no goods—a suggestion of and a prayer of execution against lands, and an award of execution accordingly.—Tidd. 1164; 2 Saund. 72, note (i); 1 T. R. 82; 3 B. & P. 105; 3 Inst. 211; Holt, 372. It might perhaps be authorised as an alternative, failing the goods in the first instance; and if postponed, possibly the land would not be charged in the meantime by the judgment; but as the execution must follow the judgment, a judgment expressly against goods and lands would not sustain a writ against either singly, and our provincial act prohibits their union in the same execution; the two acts therefore are best complied with by the course suggested. This view leaves untouched the consideration of lien, and the effect of *bona fide* alienation before execution against lands, by the heir or devisee of the debtor. The course proposed squares with the statutes taken together; and the statute 5 Geo. II. being an innovation upon the common law, the court must devise a formal proceeding to carry it into effect. A court of equity, after

the establishment of the debt by judgment, would (if no other remedy subsisted) restrain by injunction the heir at law or devisee from selling until the satisfaction of such judgment; and the act declares that the land shall be chargeable and assets, as liable in England to bond debts. In the hands of the heir they are there charged from the inception of the suit, and being of record all purchasers can readily acquire knowledge of the proceeding. The interests of heirs, purchasers and others would not be prejudiced by such a rule, because, in an action of ejectment, the judgment might be impeached for fraud, a supposed lien might be contended against, and the validity of the sale in other respects be combated. I still, however, think (adopting the late decision), that, upon the principles of the English law, a judgment to be levied of the goods and chattels, in the hands of the executor or administrator, does not comprehend lands and tenements of which he died seised in fee; but that such special assets must be embraced by some more definite allusion. The execution is founded upon and must follow the judgment, consequently a *fi. fa.* against lands and tenements to sell real estate in fee is not supported by a judgment merely against goods and chattels in hand.—1 T. R. 82; 6 T. R. 450, 525; 7 T. R. 27; 1 Arch. 291; 1 Bing. 133; Hob. 2, 59; Cro. Car. 75; 1 Sid. 340; 1 Lord Ray. 244; Comb. 352; 9 Mod. 270; 1 Bur. 141. The present sale, therefore, is not authorised by the judgment as originally entered. It appears upon the roll, however, that a writ issued against the goods in hand, and was returned *nulla bona*, under which circumstances it was competent to the plaintiff to suggest a *devastavit* against the defendant, or to elect to proceed against the lands of which the testator died seised. The roll exhibits a prayer of execution against lands, and contains its award by the court. I think the prayer of execution should be regularly preceded by a suggestion that there were lands liable under 5 Geo. II.; but if indispensable, I am of opinion that the entry should be authorized by the court, at any time when the want of it is objected. I am aware, that in proceeding by a spontaneous *ex parte* suggestion of the kind mentioned,

no one representing or privy to the estate is cited to answer and to be made a party to the record, except so far as the execution can be considered in that light under the 5 Geo. II. But the same remark would equally apply to a judgment against an executor or administrator rendered in the first instance against goods and land, and, except upon strictly technical grounds, it can be of no moment ; for, if there were no lands, none could be sold, or if they had been before execution alienated by the heir or devisee, the vendee of the sheriff could not recover in ejectment against the vendee of the heir or devisee, *unless* the judgment against the executor operated *as a lien* upon the *real estate*. It would always form a question, from what period lands made *chargeable* by 5 Geo. II. were in law charged, after which no alienation could defeat the lien of the creditor ? In the spirit of the decision in *Gardiner v. Gardiner*, it seems to me, lands as assets may, in proceeding to sale, be regarded as chattels, except that they are not chattels in hand or *bona notabilia* ; nor liable to be included in the writ against goods in hand ; or to be levied in execution, until a return of the process against such goods. Supported by the prayer and award of execution, as entered on the roll in this case, after the return to the writ against the fund, made previously liable by the judgment and the provincial statute, I am disposed to uphold the sale, and, if a suggestion ought also to appear of record, it may be entered *nunc pro tunc*.

On the other points Macaulay, J., concurred with the Chief Justice.

Per Cur.—Postea to the plaintiff.

SMITH V. SMITH.

In trespass *quare clausum fregit*, a plea of right of way under a deed must shew the parties to the deed, and a private right of way cannot be claimed by prescription in a less period than twenty years.

Trespass *quare clausum fregit*. Plea, not guilty. To second count. 1st. That defendant was and is seised of a certain close in Ancaster ; that by a certain deed made between the then owner of the said close and now of the said defendant, whose estate defendant hath, but which

deed is lost and destroyed by accident, and therefore cannot be brought into court (and date is unknown), the said owner of the close, in which, &c., granted to then owner of the said close, now of the said defendant, and to the heirs and assigns of the said defendant, a certain way, from a certain public king's highway in the said township, into, through, over and along the said close, in which, &c., unto and into the said close, now of the said plaintiff, and so back again from the said last mentioned close, into, through, over and along the said close, in which, &c., into and unto the said public king's highway, to go, return, pass and re-pass on foot, by himself and themselves, and his and their servants, and with horses, carts, &c., in and by the said last mentioned way, at his and their free will and pleasure ; by virtue of which grant defendant was and still is entitled to such way, and being so seised, &c., having occasion to use, &c., did, go, pass, &c., with horses, carts, &c., along the said way, from the said king's highway over the close of plaintiff, unto and into the close of defendant, and from thence back again, as he lawfully might ; and his cattle in passing eat a little of the grass by stealth, &c., and because the rails were encumbering, &c., removed them. 2ndly. Excepting as to building a fence upon the close, in which, &c., that long before, &c., John Smith was seised in fee of the land in the second count mentioned, and by indenture, dated 1st Nov., 1829, between him and plaintiff, the said John Smith granted to plaintiff that parcel of land, reserving thereout a road half a chain wide, running through the said land easterly to the main road ; and defendant afterwards became seised of the south half of forty-six, in the fourth concession of Ancaster, and the south-west quarter of forty-seven in the said concession, adjoining the close in which, &c., and by which road defendant, and all those whose estate he hath, have, from the making of the indenture, been used and accustomed to pass, &c., from the said main road over the said close of plaintiff, in which, &c., unto the said close of defendant and back again at their pleasure. And defendant, being so seised, and having occasion, &c., did pass from the main road over the close of plaintiff, in

which, &c., unto the close of defendant, as he lawfully might, doing no unnecessary damage, &c. Plaintiff demurs to the first special plea, for that defendant has not shewn the name of the parties to the said indenture therein alleged. To the second special plea plaintiff replies, denying that John Smith did, by the indenture mentioned in the second count, reserve, out of the land therein mentioned, a road half a chain wide, running through the said land easterly to the main road, or that defendant, after the execution of the said alleged indenture, or any, or all those whose estate he alleges himself to have, from the making of the said indenture, been accustomed to pass and repass, &c., as alleged in the plea.

It was admitted, upon the trial of this cause, that the *locus in quo* was the south-east quarter of forty-seven, fourth concession of Ancaster; and that the same, at the time when, &c., was in the possession of plaintiff, also that defendant threw down a fence enclosing the same. It was proved that defendant was seen passing over the premises on foot and on horseback; and that, in consequence of the removal of the fence, a field of wheat and another of grass were exposed and injured.

In support of the defence, the deed from the original grantee of the crown to plaintiff was proved, in which a road is reserved to the grantee of the crown. There was also evidence that the public had been accustomed to pass and repass along the alleged line of road, from the first settlement of that part of the township, as far back as forty years ago, until recently obstructed by plaintiff. It was asserted, and seemingly admitted, though not proved, that the father of plaintiff and defendant (brothers) originally owned the land of both; that he first conveyed the quarter lot above mentioned to plaintiff, reserving the road or right of way, and afterwards conveyed to defendant the premises mentioned in his plea next adjoining; but, except general evidence that such road was freely used and enjoyed for many years by all the neighbours, &c., there was no proof to sustain the justification. No proof of any enjoyment thereof, as a right annexed or running with the lands held

by defendant. It was agreed that a verdict should be taken, subject to the opinion of the court, whether there was legal evidence to have gone to the jury, and sufficient to have warranted and required them to find on the special issue of justification in favour of defendant ; if so, a nonsuit to be entered. Verdict, *23l. 10s.*, for plaintiff.

In Michaelmas Term last the *Attorney-General* moved to set aside this verdict ; and the case was argued in Easter Term last, by *Ridout* for the plaintiff, and the *Attorney-General* for the defendant. Judgment was this day given.

ROBINSON, C. J.—On the demurrer to the second plea there can be no doubt that the plaintiff is entitled to judgment, the plea being bad for the cause assigned. The case of *Read v. Brookman*, 10 *Ea.* 55, is in point.

The court are not called upon to say, whether, in their opinion, the verdict, which as been given for the plaintiff upon the issue joined in the third plea, can be sustained upon the evidence given at the trial. Whether the evidence proved the facts pleaded by the defendant cannot be determined without a view of the deed, which was not produced on the argument, and I have not seen it ; but this is very evident, that if all that defendant pleaded was proved it could not possibly be a defence. He pleads that John Smith once owned the lot in question, and, in making a deed of it to plaintiff, he reserved a road through it to the main road. Then he says, that he, the defendant, and those whose estate he hath, have, from the making of that deed, been used and accustomed to travel along this road, &c., so that he abandons any right reserved by this grant, and devolved upon him, and relies upon custom or prescription, which custom or prescription he shows the commencement of within five or six years. As a prescriptive right, he could shew none, according to that plea, and, as no right of any other kind is distinctly pleaded, the plaintiff should, I think, keep his verdict. To grant a repleader after verdict, at his instance who made the bad pleading, would be contrary to the practice.

SHERWOOD, J., concurred.

MACAULAY, J.—The second special plea asserts a right of

way in the defendant, as an easement accruing to him as seised in fee of the adjacent lot ; whereas the proof is, that the father, under whom both parties claim, did not enjoy such right after the conveyance to plaintiff, as an easement appurtenant to the lot afterwards conveyed to defendant, but as reserved in the deed from him to plaintiff. The deed to plaintiff shews the origin of the right as one reserved, and rebuts the presumption, that it was acquired by long user, or in any other way as a right annexed to the ownership of the adjoining lands. Strictly, the plea rests the right upon an enjoyment from the time of plaintiff's becoming the owner of the land mentioned in his deed. In form it attempts to justify under a prescriptive right of way, but, as it shews the commencement of the alleged right, it is not in substance and effect a plea of a prescriptive right of way. It rather is framed to assert an easement running with the land, or enjoyed by the occupiers of the land owned by the defendant ; but such enjoyment having subsisted eight years only is insufficient to confirm the easement claimed—twenty years being the established period. The evidence, strictly speaking, proves that defendant, and those owning the lands now held by him, did enjoy the right of way from the time his father conveyed to plaintiff, but not as annexed or in any way connected with the possession or title to the lands now held by defendant. And if otherwise, and were the issue found for defendant, the plaintiff would still be entitled to judgment *non obstante veredicto*, because an enjoyment for eight years only would not confer a right ; and the plaintiff's deed rebuts any enjoyment antecedently adverse to the ownership of plaintiff's lot, and in favour of those occupying defendant's. The plea contains no defence upon the facts suggested therein. The defendant should have relied upon a public right of way, to establish which there was, I think, some evidence proper to go to a jury ; but, while the father owned both lots, no right could accrue to the owners of defendant's part against the owners of plaintiff's part, and when he parted with the latter he reserved a right. The enjoyment afterwards by him was under such reservation, and not by

reason of his interest and possession of defendant's part; and, were it otherwise, such enjoyment to confer a vested right should have subsisted nearly, if not quite, twenty years. Until after defendant became seized there is no evidence except of a public right and of a private right reserved by deed.

Per Cur.—Judgment for plaintiff on the demurrer, and rule nisi to enter a nonsuit discharged.

THE KING V. FERGUSON.

A conviction, under 40 Geo. III., ch. 4, for selling spirituous liquors without license, was quashed, because the information stated, that "the defendant was in the habit of selling spirituous liquors without license," without charging any specific offence, and not shewing time nor place, nor that the liquors were sold by retail, and also, because the conviction directed the defendant to pay the costs of the prosecution, without specifying the amount.

The defendant was convicted, under the 40 Geo. III. ch. 4, of selling spirituous liquors without a license; and *Spragge* moved to set aside the conviction on several grounds, which were overruled: but the court held the conviction could not be sustained, on several objections not taken by the defendant, but which, as the conviction was brought under their notice, they could not overlook. 1st. The information is erroneous. It states that "the defendant *was in the habit of selling spirituous liquors without license*," which charges no specific offence, nor alleges any time or place, where and when such offence was committed. 2ndly. The conviction does not say he sold spirituous liquors "by retail," which is a totally different offence from selling by wholesale. 3rdly. The conviction directs, that the defendant shall pay 20*l.* and the costs of the prosecution, without ascertaining and stating the amount, which is also clearly bad.—2 T. R. 22; 2 M. & S. 169; 1 Ea. 189; Cow. 60; 8 Ea. 574; 2 Salk. 660; Cald. 458; Doug. 232; Paley, 86-7; 2 Lord Ray. 1268; 4 D. & R. 72; 13 Ea. 57.

Per Cur.—Conviction quashed.

BADGELY V. BENDER.

A piece of land, marked out in the original plan of the township, as an allowance for road, does not lose that character, because it has never been used as a road for a period of forty years, and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled.

Covenant for title. Breach, that the track was a public highway. Plea—traversing the highway. The defendant conveyed to the plaintiff a small tract of land in the township of Stamford, near the Falls of Niagara, with the usual covenants for good title, and right to convey. After the deed was executed, plaintiff discovered, as he asserted, that a public allowance for road, of the usual width, ran through the centre of the small tract which the defendant had assumed to convey to him. No road had been used or opened there ; but the allegation was, that part of the tract was in fact a public reservation for a highway in the original survey of the township, that might be opened and used as such whenever the public chose ; that the defendant had no title, and could give none to this part of the tract, as it never was included in the patent from the crown, under which he claimed. The defendant denied that there was any such highway there. The evidence was, that by an official plan (a copy of part of which was produced) of the township of Stamford, by whom compiled, or from what materials not appearing, certain allowances for roads are designated—and, amongst others, at different points along the front, governed by the supposed bends of the river, one of which roads terminates at the lot next to the one in question on the north, at a point where it is supposed to form a junction with a reservation of one chain along the top of the bank. Upon actual survey, it appeared the road would not meet the reservation without crossing the defendant's lot also, in that part which he conveyed to the plaintiff. A draftsman and deputy-surveyor, from the Surveyor-General's office, proved that the defendant's lot is of sufficient width to allow fifty chains, the length of a full lot, exclusive of an allowance for road, and a small triangular broken front. He infers that the government intended to reserve a road

throughout, along the front of all lots, fifty chains deep, from any point of the reserve, one chain in front, to another. That concession road had not, to the knowledge of the witness, been opened or used in any part of it. The patent for No. 144 says "with allowance for roads," which the witness said reserves the concession road ; and that in some lots, where more than fifty chains before the military reserve is reached, the lot takes all, but excepts allowance for roads. No side-lines (roads) are in the tract comprehended in the patent, and therefore allowances for roads must mean the allowances in front.

The defendant's counsel contended that there was no proof of a road, even according to the plan. The plaintiff had a verdict, subject to the opinion of the court, whether there is now an existing allowance for a public highway in that particular plan ; if not, the plaintiff to be nonsuited.

This case was argued in Easter Term last, by *Sullivan* for the plaintiff, and *Draper* for the defendant ; and stood over till to-day for judgment.

ROBINSON, C. J.—At the trial, in order to prove that part of the tract sold was a reservation for a public highway, and never had been the property of the defendant, a copy was produced of the original diagram or plan of survey of the township of Stamford, remaining among the archives of the Surveyor-General's office. It was certified by the Surveyor-General to be a true copy of the original plan, and was proved to be so by Mr. Chewett, surveyor and draftsman in the department. This plan of the original survey shewed that the township of Stamford was divided, like other townships, into several ranges or concessions of equal width, which run parallel to the general course of the Niagara River. The depth of each concession is fifty chains ; and in front of each concession, that is, at the termination of the fifty chains, measuring from the rear to the front, there is exhibited in the plan an allowance for a highway, such as has been made generally, if not universally, in the several townships throughout the province, which are known by the familiar name of concession roads. The range or concession, in which the premises in question are

comprised, touches, in some parts of it, the Niagara river, and it is not, therefore, an entire and uniform range of lots, as those in rear of it are, but the river, in its different curvatures, infringes upon it, so as to leave, in some parts of the concession, a very narrow bit of land, in others, a space or depth nearly approaching to a full lot ; and in other parts again, the river entirely recedes from the concession for a long distance, leaving a number of lots of the full and regular dimensions, lying side by side, as in the other concessions, with the same allowance for road at both ends. On the sketch produced eight of these lots lie thus entire, side by side, to the eastward of the lot in question, extending from one bend of the river towards another, in front of all which there is an allowance for road marked in the plan, as in all the other concessions. The next lot, joining this unbroken series to the west, appears on the plan to be an imperfect lot, being infringed upon by the river, which cuts off the south-western corner ; so that the allowance for road, which in every concession is protracted in a straight line, meets the river and terminates there, or rather, as was explained by the surveyor examined at the trial, it meets a reservation of a chain in width along the top of the bank of the river, which was left in the original survey of the township. The next lot to this first broken lot is the one of which the premises in question formed part, and, according to the diagram, that lot is so much encroached upon by the river, in its winding course, that no part of it is of the full length of a lot, and, towards the west side of it, it would seem to be deficient almost one half of the depth of the other lots in the same concession. The allowance for road, therefore, in the front of this concession, which ceased before it crossed the front of the lot next it on the east, appears nowhere on this lot. If it were protracted on the plan, it would strike the river near the falls, and would depart entirely from the land, passing through the river in front of six lots and part of a seventh, where, from the bend of the river, as represented in the diagram, it would again strike the land in the township of Stamford, and in the same concession. And the plan does accordingly exhibit the

allowance for road, which had been necessarily dropped at the point before mentioned, as taken up again at the point last mentioned, and continued along the front of the lots in the same straight line ; thus showing in front of this concession the same allowance for road as in front of the other concessions, with this difference only (of which the reason is apparent), that it is not a perfect line throughout, but is interrupted by the water prevailing wherever there is space for it, at the end of fifty chains (i. e. where the concession is full), and necessarily dropt where there is not—the intention being evident to make it like other concession roads, a straight line, bounding lots of equal length. According to this plan, therefore, there would seem to be no allowance for road in the lot in question, lot 144, because there appears to be no room for it, owing to the encroachment of the river. The surveyor proved, however, that the course of the river is not accurately represented ; that, so far from the eastern limit of this lot being less than the fifty chains in length, it is in fact fifty-three, though the river does wind along the front of the lot in the eastern part of it, so as to deprive it there of its full length. Protracting the concession road, therefore, to the river, as marked in the plan, it would pass along part of lot 144, before it reaches the reserved chain along the bank of the river. The surveyor proved, that having done this in the course of a survey he had recently made, by the direction of the government, he found that part of the land, which the defendant had included in his conveyance to the plaintiff, would fall within the line of the concession road ; and in fact, if the road is to be thus continued, it would occupy about half of the plot of ground sold, which, from its situation, is valuable. It was proved, that in the patent for the lot, these words were inserted, “with allowance for roads ;” and that the course of the side line is made to run from the rear fifty chains, more or less, to within one chain of the top of the bank of the Niagara river. And further, the surveyor explained, that where the lots exceed fifty chains, as they do in some parts, from the turning of the river, the excess is deemed to be included in the grant, under the words

"more or less," and the grantee takes the lot of land between the concession and the river, leaving the concession road ungranted. He states that, according to the received understanding of the grant, when it says in conclusion, containing so many acres "*more or less;*" "*with allowance for roads,*" that is taken to mean whatever quantity of land the limits given to the front of the river may be found on actual measurement to comprise, the grantee is to have with allowance or deduction for roads, as laid down in the original survey. The defendant at the trial contended, that the plaintiff had given no evidence that there was an allowance for road through any part of lot No. 144. I thought he had ; but not intending to decide the point at *nisi prius*, I directed the jury as to the damages, and took their verdict for the plaintiff, subject to the opinion of this court, whether the evidence supported the allegation, that there was a highway running through the piece of land in question. There was no doubt surmised as to the genuineness of the original plan of survey, nor anything to be weighed as to the credibility of witnesses ; there was no conflicting testimony. The question therefore is, was their evidence of a highway given, and such evidence as being unimpeached ought to have led the jury to find a highway legally established across this piece of land ?

And this resolves itself into two questions. 1st. Was the evidence that was given admissible in its nature ? 2ndly. Did it establish satisfactorily that there is there an existing allowance for road ?

I cannot say that I have the slightest doubt on either point.

That the evidence was legal evidence has not, I think, been seriously questioned. It is probably forty years or more since this township was laid out. It is but seldom now that recourse can be had to the *viva voce* evidence of the individuals who actually made the original survey of these early settled townships. More than a generation has gone by, some few of them may yet be left, but a few years will place their evidence out of reach, and even where it may yet be had, their verbal account from memory, of what they did forty years ago, would be in truth a much less safe and

satisfactory description of evidence than their official return of their survey delineated on paper at the time ; and besides when we know that it is on these official documents that the patents have been subsequently framed, we must be convinced of the extreme danger of trusting so implicitly to anything else as to these official diagrams, for information upon the plan on which the several townships were laid out. This has not been questioned in our courts, at any time, within my knowledge. I mean the court has never hesitated to receive the original plans called the Quebec plans (in reference to these old surveys made before the division of the province), as evidence of the manner in which the respective townships have been subdivided ; with respect to the numbers of lots, allowances for roads, and, in short, the general scheme of the survey, it is our established practice to admit them ; and I conceive it to be undoubtedly warranted by the principles of evidence according to the law of England. I do not mean to prejudge any question that may be raised in another case, as to the effect of other evidence, to oppose or explain anything exhibited in these official plans in respect to a particular matter. I speak only at present of its being admissible as evidence, which, in my opinion, it is most clearly. We are then to consider whether the plan shews that, in the original survey of the township, there was a highway reserved across the front of lot No. 144. At the trial, and now, this appears to me so clear in the affirmative that I could hardly have felt it necessary to enlarge upon it ; but, as unfortunately we do not all see this matter in the same light, I must endeavour to make my view of it intelligible, though I do really look upon it to be one of those self-evident propositions that it is difficult to illustrate by reasoning. What is the known course of these things ? A surveyor is directed by the government (in the case before us probably more than forty years ago) to survey a township under certain instructions. He performs the work, and returns an official diagram to the office of the Surveyor-General, exhibiting the manner in which he has divided the township—the number of lots he has made, their shapes and dimensions, and the allowances he has left

between them for roads. If he placed monuments along these roads to mark them, they were doubtless of wood, and have long ago perished ; at all events no proof was attempted to be given here respecting them. At this day a dispute arises, whether there was any allowance for road left at the end of fifty chains, measuring from the rear of a particular lot. The natural recourse for clearing up this doubt is to the original records in the Surveyor-General's office, where we find evidence stamped with public authority, free from the suspicion of being biassed by individual interest, or of being manufactured to suit the purposes of either party in this contest. There we see the map exhibiting now, precisely as it did from the beginning, the spaces of land which the king intended to grant, and those which he intended to withhold from granting ; and knowing, as we do, that the grants were framed from this plan, and meant to carry into effect the scheme which it exhibits, it becomes the duty of courts and juries to give to the words of the patent such a construction (if they are capable of it), as will be most consistent with the known and evident intention. It is only by doing this that public convenience and private interests can be secured. Now, when I look upon this plan to determine the point in dispute, a single glance satisfies me, and I think must satisfy any man, that among "*the allowances for roads,*" which the patent makes reference to, there is one in front of this lot, No. 144, *provided that lot shall be found to hold out fifty chains and upwards before the side-lines reach the river.* The plan tells me plainly that a road was laid out in front of each space of fifty chains, and that that road was meant to be carried through the whole length of each concession where that is possible. I see that if this map is correct in delineating the bends of the river, the road cannot continue uninterrupted along this concession, but it is made to go as far as it can go ; the evident design being that the public, and the inhabitants of the vicinage, should be able to travel from lot to lot in this concession, as well as in the others, without trespassing on any private proprietor. Accordingly, whenever we find room for it on the plan, we find the road ; when the line thus protracted would

strike the river, then the road is carried forward to the reserved chain along the bank, and along this reserved chain the public can continue to pass, and that forms their road until they come to a place where the receding of the river again leaves room for the full length of lots. At that point we find on the diagram the road is taken up again, and continued in a straight line, as in other concessions, so that an uninterrupted road is preserved along the front of these lots as well as of all the others. No person can say the plan does not shew this to be the principle and design of the survey; but then it may be objected that the plan shews no road through or along No. 144, and that if we take the plan as evidence at all, we must take it as it is, and conclude no road was left there, because none is marked there. In this respect the plan only proves to me what we all knew before. I am well aware, and so is every one at all conversant in such things, and I have heard it several times proved in other trials, by surveyors on their oaths, that unless surveyors are directed by the government for some special purpose to lay down accurately the rivers, lakes or streams which border upon or intersect the townships which they are surveying, they never do so in fact, but content themselves with giving a general idea of them from the eye, or by noticing the points where their lines actually intersect them, not pretending to delineate minutely their several indentations.

To do so, would require a multitude of offsets, and make the survey much more tedious and expensive. It is not necessary either for the object of the survey, because the grants of land are made with the qualifying words, more or less, as to quantity of land, and length of side lines, so as to extend to the front of the water where that is meant, whether it be more or less remote than is supposed. I am not therefore at all surprised, that it is found here, on measurement, that the surveyor is mistaken in his idea of the course of the river, and has therefore not shewn a road where, from the principle and design of the survey there must be one; he has shewn no road, because he thought there was no room for one, but there is room for it, and

therefore, in my judgment, the road continues as of course. Where we are to follow his plan, and where to renounce it, it is in my mind plain enough; we are to follow it where it can be, and is true, and to renounce it where it is evidently false. It can be, and is undoubted evidence, to shew the scheme and principle of the survey; but where the doubt is whether the river touches the land at the point in which he says it does, we must measure the ground, in order to be quite sure; and when we find it does not, we cannot believe his plan in that respect, because we know better; but there is nothing to shake the inference arising from the plan, that there is a space allowed for the road from one bend of the river to the other, let those bends be as deep as they may. The diagram may shew me conclusively the plan of the survey, because that plan was wholly in the power and discretion of the surveyor, and how he exercised that discretion, is the only question; but it cannot shew me conclusively that the river runs part of the way up the lot 144, supposing that lot to be fifty chains long, because that is a fact which the surveyor had no control over; that is a feature of nature which he could not change, and his representing it falsely cannot alter the matter. We must apply the scheme of his survey to the ground itself, and the results are to guide us, not his pictures of natural features, which are independent of his mathematical lines. If those lines shew more land within them than he supposed there would be, we can only determine how the land is to be disposed of, by applying the principle of his survey to the fact, instead of applying it to his *erroneous idea of the fact*.

It is hardly necessary to say, that if we are satisfied there was an allowance for road in this particular spot in the original survey, that allowance remains, unless it has been otherwise disposed of by legal means. The statute of 1810, respecting highways, confirms all allowances for roads made by the king's surveyors, in any township then laid out, as this was. This allowance might have ceased to be an allowance for a highway, if another space had been substituted for it by a legal proceeding adopted in con-

formity with that statute, but it is not pretended that any such alteration has taken place—as to the mere fact that it has never been opened or used, that is nothing. The crown never at any time attempted to resume it—it is left to answer the purpose for which it is reserved, whenever the inhabitants may think it desirable so to apply it. There are some hundreds if not thousands of miles of concession roads in the province, awaiting in the same manner the period when the inhabitants may be willing and able to overcome any natural obstacles that may have prevented them being actually made fit for travel, in the early periods of settlement.

SHERWOOD, J., concurred with the Chief Justice.

MACAULAY, J.—The question here is, whether the evidence proves a public highway crossing the land sold by the defendant to the plaintiff.

A highway may be created by *dedication*, and the public roads allowed by the crown in the original organization of the several townships of this province, are of that origin. It was enacted by 50 Geo. III. c. 2, s. 12, "that all allowances for roads, made by the king's surveyors, in any town, township or place already laid out, should be deemed common and public highways." This enactment contemplates the dedication of roads. The act of the king's surveyor, in making an allowance, is regarded as a dedication on the part of the crown, and the statute operates as an acceptance thereof as a public way, on behalf of the community. The alleged public way must subsist, if at all, upon one of two principles: 1st, as being an allowance for road made by the king's surveyor, in which event it is embraced by the above mentioned statute; or, secondly, as being reserved and dedicated in the original grant from the crown. In the latter event, it is apprehended, no public right would necessarily accrue. A reservation by the king of a public way, through a tract of land granted by letters patent, would not constitute a public way. Such a reservation on the part of the crown might be considered a dedication; but an acceptance by the public must be superadded to create a public right. There must be reciprocity. The crown must

be bound by the dedication, and the public by the acceptance. It appears to me that there is no evidence here that a highway was established as contended, in either point of view. There is no evidence of its having been allowed by the king's surveyor, and it is not reserved in the government grant, and, if it was, it has never been used or adopted by the public. Mr. Chewett says he collects all his information and forms his opinion from the plan, and infers that there is a highway because he finds upon actual measurement, that the extent of lot No. 144 is sufficient to have admitted of such allowance originally. Since, therefore, he relies upon the plan, it is to be considered in what light and to what extent it is to be admissible in evidence, and by whom its legal operation and effect are to be decided, whether by the court, as a written document, or by the surveyor, as a matter for scientific interpretation. It may be admissible on two grounds. 1st. As being compiled from actual survey. 2ndly. As being a mere diagram or plan of the distribution of the tract composing the township into lots, roads, &c., but it should be proved which. In the absence of other proof, it must be presumed to have been compiled from the field book, &c., of the original survey; and in either event it would indicate no intention to reserve an allowance for road in front of defendant's lot, 144. If it accurately represents the original survey, it follows that no allowance was made by the king's surveyor; if it is merely a scheme of the division of the township, it shews that a road was intended to or from 129 northerly, and not to or from 144. Upon whatever principle admissible, it must, as far as it affords evidence in itself, be conclusive upon itself. If it is received to prove a road at all, it must be taken to prove a road only as laid down. It cannot be admitted *per se* to prove—first, that an allowance was reserved, but, secondly, not as laid down therein. It cannot be rejected as to the *termini*, or be varied by extrinsic facts, not arising out of the original survey. It may, I grant, be varied or corrected by the original operation, by virtue of the stat. 59 Geo. III. ch. 14, but not by other collateral circumstances. The Government, in preparing the tract

called the township of Stamford for grant, must have divided it into lots intersected by roads, and instructed the surveyor how to proceed in laying out the same. In afterwards describing several of these lots in one grant, the whole tract has been embraced as containing the supposed quantity of acres, with allowance for roads. The expression, as used, does not mean or imply that in such description there must be an allowance for more than one road, viz., for roads, but that it contains a portion of the allowance for roads made in that township. The patent does not point out or designate the course or extent of such allowance, and it becomes necessary to resort to extrinsic aid to discover it. The best proof is, the allowance made on the ground in the original survey. If that cannot be established, the public records may be looked to; but they, unless proved by the actual survey originally made to be inaccurate, should not be deviated from, unless upon some other clear and unequivocal ground. Lands are frequently, if not always, described by the plans, which are supposed to accompany the report of, or to be compiled from, the original survey. And in the present instance, it is clear that no road in front of 144 was reserved or intended to be reserved in the grant, if the description therein was framed by the plan of the township, as it apparently was.

It may be supposed the allowance for road would have extended through 144, until it met the one chain reserved on the top of the bank, fifty chains from the rear of that lot, had it been known that upon actual measurement there was ample space. Still the plan shews, as contrasted with actual measurement at the present day, that the length of the lot had not been correctly ascertained, and that it was not known or conceived to contain even fifty chains, much less fifty-two or fifty-three, as stated by Mr. Chewett. The plan does not prove that an allowance for road was upon the original survey left at the end of every fifty chains, any more than that as respects the one in question, it was reserved as laid down, viz., as joining the one chain on the top of the bank at lot 129, and not 144.

There is no other proof that an allowance for road was

made by the king's surveyor in the original survey, or otherwise reserved or established, except that afforded by the plan and description. The description is predicated upon the plan, and assumes the north side of 144 to be forty-eight chains only from within one chain from the top of the bank. The length of 144 and 143 in its rear, and the concession road between them, is taken to be ninety-nine chains—i.e., fifty chains to 143, one chain to the road, and forty-eight chains to 144. It is manifest, therefore, the grant could not have contemplated a road in front of 144, at the distance of fifty chains from its rear, and could not be understood so as to reserve one under the expression "with allowance for roads." The only road embraced by the description, as evinced by the plan, is the concession road in rear of 144 (*a*).

It may be inferred from Mr. Chewett's evidence, that in the original survey the lines were run from the rear of the first concession to the front, and posts planted accordingly at the front angles. The patent speaks of a post planted one chain from the top of the bank, and there is no proof of any other post between that point and the rear of the lot, to mark a road or broken front. The patent does not allude to any broken front, and could not have anticipated any. Erroneous chaining may have prevailed along the whole concession, and the allowance for road in front of the lots lying northerly of 144, may in the original survey have been left fifty-two chains instead of fifty chains from the rear of those lots, owing to such inaccuracy of measurement. It is not proved that any front posts of lots marking the west side of the alleged road have been found, or ever existed, or that if they can be traced, a line protracted southerly from them would not meet the reserve of one chain on the top of the bank at the south-east angle of lot 129, and without touching upon No. 144. If an allowance was made in front of 144, it must have been in one of two ways: 1st, by the surveyor in the original survey, but this is not proved to

(*a*) The patent included lots 143 and 144, lying in different concessions, but embraced (with the allowance for road between them) in one description.

have been done, and the plans, grant and possession argue the contrary ; or if intended by him, he may, by careless or erroneous measurement, have planted the posts all along fifty-two chains from the rear of the concession, instead of fifty chains, upon which principle no space will have been found for any allowance in front of 144 ; 2ndly, by the government distributing the tract composing the township into lots, &c., allowing and appointing an allowance for roads at the end of every fifty chains, and then granting the lots dedicating such reservation in apt terms. No such reservation or dedication is expressed in the patent for lot 144, and the plan only shews it by implication or inference. As evidence of the original intention or actual survey, it would manifest no design to retain a road across the front of 144. It is obviously founded upon some actual operation, accurate or defective. If an accurate representation thereof, on actual examination of the ground, now shews it to have been incorrect—but it is not proved that the original survey and plan do not correspond—and *that* survey, however inaccurate, must govern. Had it been intended to reserve a road in front of that lot, should the ground admit, the patent should have contained a proviso, that if the depth of the lot exceeded fifty chains, then an allowance was reserved, until it met the reserve of one chain from the top of the bank, at the distance of fifty chains from the rear. This is not done, and it was not intended, for it was presumed the lot would reach the bank within fifty chains. If a road could now be claimed, the plan and description would seem only calculated to mislead the parties ; and the lot may have passed through many hands before it was known that the northern side-line was of greater length than the patent and plan represented and supposed.

The grant was made about thirty-five years ago, and no public right of way has ever been claimed or exercised, under which circumstances (upon the principle of the decision in this court of the King v. McGill et al.), the crown might have sold or granted away the space alleged to have been appropriated for a road, even though originally reserved as an allowance, unless prevented by the operation

of the provincial statute already mentioned, declaring all allowances made by the king's surveyors in the original survey public highways, or precluded by reason of the public having acquired a vested right by acceptance or enjoyment.

The evidence offered in this case would not sustain an indictment against the plaintiff or defendant for obstructing the alleged highway, being insufficient to establish a public right, the infraction of which must necessarily be averred ; and the issue in this cause is (not whether an allowance for road was originally reserved across the front of 144, but) whether a common or public highway subsisted there at the time the defendant conveyed to plaintiff. I am of opinion no such way is proved, and therefore that judgment should be entered for the defendant.

Per Cur.—Judgment for plaintiff.

MACAULAY, J., dissentiente.

WARD V. SKINNER.

The court relieved a sheriff on payment of costs, bail being perfected, where he was in contempt, for not bringing in the body, although a trial had been lost ; it appearing that the sheriff was not in fault for the loss of such trial, and it being sworn that the application was made solely on his behalf.

Bail in this cause having been perfected, *Draper* moved to relieve the sheriff for an attachment for not bringing in the body, on payment of costs.

Campbell, E. C., objected that the bail-piece, being signed by the defendant's attorney, shewed that it was done for the defendant, and at his instance, and not at the instance of the sheriff alone ; and, secondly, that the attachment should be ordered to stand as a security, as the plaintiff had lost a trial. Note :—There was the usual affidavit that this application was on behalf of the sheriff only, and the trial had been lost in consequence of the court delaying to give judgment on a former motion.

Per Cur.—The sheriff, according to the practice, should be relieved on paying costs, bail above having been put in and perfected. It is objected that the bail-piece having been signed by the attorney for defendant, instead of the

attorney for the sheriff, shews that it was done for the defendant, and at his instance, and that, according to the case of *The King v. the Sheriff of Surrey*, 7 T. R. 239, this is irregular, as it should appear to be at the instance of the sheriff alone. It is further contended, that an attachment should be ordered to stand as a security, inasmuch as the plaintiff has lost a trial.

In respect to the first objection, there is a positive and full affidavit that the application is made for and on behalf of the sheriff, without collusion with the defendant, and for his indemnity. And this is all that the practice requires, as appears in the case cited, where an affidavit, such as is made in this case, was first exacted.

In respect to the second objection, it must be considered that bail was put in, though irregularly, long before the last assizes, and, if the court had not had doubts on the principal exception raised to the conduct of the sheriff, in discharging the party before he had perfected bail, which doubts had occasioned them to postpone their consideration of the case beyond the term, a trial might not have been lost. The sheriff should not be prejudiced by a delay not resting with himself, and it would be acting more rigidly than is usual in these cases, to order an attachment under such circumstances, merely that it might stand as a security.

Per Cur.—Rule absolute on payment of costs.

BEAL ET AL. V. FIELD ET AL

Declaration by assignee of sheriff on a bail bond ; venue in the margin in the Home District ; assignment of the bond stated in the declaration to be at S., in the Western District, without laying any venue for this act in the Home District ; *Held* bad on special demurrer.

Debt on assignment of bail bond, given to the sheriff of the Western District. The venue in the margin of the declaration laid in the Home District. The declaration stated the suing out of the writ in the original action, "at York, in the Home District," its delivery to the sheriff, "at Sandwich, to wit, at York, in the Home District." That the sheriff made the arrest "within his district, as sheriff, to wit, at Sandwich, in the said Western District." That the she-

riff took bail "within his district aforesaid, at Gosfield, to wit, at Sandwich aforesaid." That the defendants, "at Gosfield, to wit, at Sandwich, in the said Western District," made their bail bond. That the sheriff, "*to wit, at Sandwich, in the said Western District,*" assigned the bond. The defendants demurred, assigning for cause that although the venue is laid generally in the Home District, yet there is no venue or place stated or alleged where the said supposed assignment of the said supposed writing obligatory is said to have been made, but the said assignment is stated to have been made at Sandwich, in the Western District, and not within the Home District.

The demurrer was argued in Easter Term, by *Ridout*, for the plaintiffs, and *Draper* for the defendant, and at this day judgment was given as follows.

ROBINSON, C. J.—It will be seen by the declaration, the plaintiffs first take the Home District for their venue in the margin, as if bringing their action there; that they next assign the Home District as their venue, when they state the issuing of the writ. This corroborates the inference that they are bringing their action in the Home District, because the issuing the writ is a material and traversable fact, the very foundation of the whole, and it is a statement compounded of law and fact, as is explained in Bulwer's case. —7 Co. 1. It is true, it is a matter of record, and if desired must be tried by the record at York; nevertheless (as is said in *Downey v. Bayward*, Cro. Eliz. 844,) although matter of record, it is part of the cause, and the jurors who try it must take cognizance of it; and therefore the laying the venue as to that averment in the Home District, without any reference by a *scilicet* to the Western District, is further confirmation that the plaintiffs intended to lay their venue in the Home District, so as not to leave that inference to rest on the margin solely. Next they state, that the writ when sued out, was delivered at Sandwich, to wit, at York, in the Home District. Here they afford further ground for saying, that they are laying their action in the Home District, because they bring this fact within that district by a *scilicet*, having laid it first within the Western District,

where it naturally must have occurred ; and if we attend at all to the system and practice of pleading, we must know that their only reason for doing this was, to bring the fact within the cognizance of a jury of the Home District, where they intended it to be tried ; and I am disposed to think, that this fact of the delivery of the writ to the sheriff, to which they expressly assign the Home District for a venue, is material and traversable.

In Jones v. Green, 2 Lev. 19, and in Osborne v. Bank-house, 3 Lev. 93, it seems to have been held that a bailiff may justify arresting under a warrant made to him by the sheriff before the writ was delivered to the sheriff ; and on the ground, as mentioned in the latter case, that the bailiff is not privy and has not notice when the writ is delivered to the sheriff. But in Greene v. Jones (1 Saund. 298), as reported by Saunders, it is stated that the court were of opinion that it might be intended that the writ was delivered to the sheriff, from the statement *per quod* he made his warrant, &c., they only held that the omission to state the delivery expressly was not demurrable ; and, they add, that if it were not delivered, the plaintiff should have replied specially to the plea of justification, that the writ was not delivered. We must therefore imply, that they did consider it a material fact and traversable ; for otherwise no issue could have been raised upon it, as they suggest. And further, Saunders closes his report by saying that they gave the plaintiff leave to discontinue upon payment of costs ; because, in truth, the writ was not delivered to the sheriff until after the arrest, as they were informed by the plaintiff's counsel ; and Sergeant Williams, in a note to this case, says, the accuracy of the report in Levinz, that the court considered it lawful for the sheriff to make a warrant to arrest before he received the writ, seems very questionable. Looking no further than these cases, I should draw from them the conclusion, that if the sheriff arrested before the writ was delivered to him, his arrest would be illegal, and if so, then the delivery of the writ must be a material fact, to which the venue of the Home District is assigned. And moreover, since these cases, the stat. 6

Geo. I. c. 21, s. 53, has been passed, which prohibits the sheriff "from making any warrant to a bailiff to arrest, before he shall actually have in his custody the writ," and makes him liable to a penalty of 10*l.* When a statute prohibits anything, and attaches a penalty, it makes the act done against the statute void ; and accordingly, in Hall v. Roche, 8 T. R. 187, the court, in a summary manner, set aside a bail bond, which had been given upon an arrest made before the writ was delivered to the sheriff, deciding, without calling for any argument in support of the rule, that the arrest was illegal if made before the writ was delivered to the sheriff, and as they further inferred from the affidavit, without any warrant. Upon the statute 6 Geo. I., I should conceive that no doubt can remain, since the sheriff, before he has got the writ in his custody, can give no authority to another to arrest, it would seem to follow, that he cannot arrest himself. In England, indeed, we know the sheriff never arrests in person, and parliament in prohibiting arrests under warrants, before the writ was in the sheriff's hands, must doubtless be supposed to have contemplated the prohibiting arrests altogether before the writ had been so delivered, for that was the effect of the statute there.

Then after laying the venue in the margin in the Home District, and assigning the same venue to two other facts material to the action, the plaintiff proceeds to aver the arrest, the giving the bail bond, and the assignment, laying the venue for all in the Western District. The two latter of these averments are undoubtedly material and traversable ; the arrest, it is held, is not traversable in an action on the bail bond.

In respect to the venue we find these principles clearly established :

1st. That when the plaintiff's action is grounded on several facts, which occurred in several counties, he may bring his action in either, and this from necessity, even although some of these facts are in their nature local and not transitory.—7 Co. 1 ; 7 T. R. 358.

2ndly. That the venue in the margin may help but shall not hurt ; so that if no county is named in the body of the

declaration, but a parish or place only, it shall refer to that named in the margin, when it will give a right venue ; and if a venue be stated in the body of a declaration which would be a good venue, that shall be taken to be the venue, and that stated in the margin, if it be different, may be rejected as surplusage.—Barnes, 483 ; 3 T. R. 387 ; 3 Wils. 340.

3rdly. It is clear that after verdict, if the cause be tried in the right county, any improper statement of the venue is immaterial.

But here the body of the declaration contains two venues so distinctly stated as to be incapable of being taken for the same by any intendment ; one of them agrees with the margin—the other, though it is assigned as the venue to averments which are the most decidedly material and traversable, differs from that in the margin ; and in the next place, this apparent uncertainty and repugnance is not objected to after trial, but is demurred to *specially*, which compels us to determine whether the action is laid with sufficient formality and precision. Almost all the cases in the books are where the objection was taken in arrest of judgment, that the venue was defectively stated or bad. In Miller v Barber, 3 T. R. 387, the venue in the margin was London, and the cause of action in the body of the declaration was laid at Derby, and the defendant demurred generally ; but the court held it not bad, on general demurrer, being cured by the statute of Jeofails. But Buller, J., says, “*on a special demurrer there might have been some doubt.*” In that case, however, it was but necessary to disregard the venue in the margin, and the body of the declaration gave a single, certain and good venue ; and so the case came within the rule in Barnes, 483 : and Buller, J., thought that might not certainly be allowed to pass, on special demurrer ; but here, if we discard the venue in the margin, we find two stated in the body of the declaration, and which shall we adopt ? Besides, I can find no case that would allow us to reject the venue in the margin as surplusage, when it supports the venue stated to several averments in the declaration. So far from that, I should say that under such circumstances

the margin would be taken to decide where the plaintiffs meant to lay their action, and if so, then they have laid two facts certainly traversable, with a different venue, which is the informality assigned as the cause of this demurrer.—Vide 10 Ea. 375; 11 Ea. 306.

The rule is, that to every material fact there must be a venue assigned. To the first two averments there is either no venue assigned, or the Home District is the venue—certainly we cannot intend the Western District, by any reference or construction; and then to the last two facts, clearly material, a venue is assigned, which can be made nothing but the Western District by any construction. On a declaration laying several venues in this informal manner, if a defendant wished to change the venue, or to have the trial in an adjoining district, or to subpoena his witnesses for trial, he would certainly find it difficult to say where the plaintiff meant the trial should be; he would doubtless, I think, however, assume it to be in the Home District—in which case the latter averments are certainly not laid with a proper venue. The case of Sutton v. Fenn, 3 Wils. 339, was upon general demurrer, and, as I think, strongly supports the objection to such a declaration as this upon a special demurrer. In Sir W. Blackstone's report of the same case, De Gray, C. J., says, "there is no difficulty in this case; the margin governs the whole;" which seems to support the inference, that this declaration must rather be looked upon as laying the action here, than in the Western District; and if so, then the subsequent laying of the venue for other facts in the Western District, would be inconsistent and bad on special demurrer, for it would be uncertain (and I think it is uncertain) whether the *venire facias* should go, which is bad on special demurrer.—2 Saund. 5, note d.

I therefore think the defendant should have judgment on this demurrer.

SHERWOOD, J., agreed in opinion with the Chief Justice.

MACAULAY, J.—The district in the margin will help, but not vitiate; consequently the Home District written in the margin may help, but shall not prejudice the declaration. It is not referred to at all in the body of the declaration; and

upon the whole, it seems to me, the venue is laid in the Western District. The action is founded on the bond and assignment, both laid there. The venue may be laid where the bond is taken, or where it is assigned; and in this case the taking and assignment are both laid in the Western District. There can be no doubt as to the venue in this case, unless it be occasioned by the way in which the delivery of the writ to the sheriff is alleged. It is stated as having been so delivered at Sandwich, to wit, at York, in the Home District. I have not been able to satisfy myself that the allegation is material and traversable as a plea in bar, and if not, being matter of inducement and immaterial, it would require no venue, and with the place laid might be rejected as surplusage; and even if material and traversable matter of inducement, which I am not satisfied it is, I should think, upon a view of the whole declaration, the words, "to wit, at York, in the Home District," might still be rejected as repugnant to the rest of the record, leaving "at Sandwich" remaining, which, compared with the same plan as elsewhere used, would be construed to mean Sandwich in the Western District. The issue of process may well be laid where the court sits, and where any issue to the record may be tried, and the material facts in the Western District, where they arose, and in which the venue might therefore be laid. Rejecting the margin, isolated as it is, and also the use of the words, "at York, in the Home District," after "Sandwich," which I think may be done, the venue appears to me to be laid in the Western, and not in the Home District, and consequently the demurrer is not sustainable on the ground suggested.—Hardw. 343; 3 M. & S. 148; 2 H. B. 162; 11 Price, 409; Cro. Eliz. 625; 1 Taunt. 329; 1 Vent. 264; 5 Ea. 473; 2 Str. 727; 1 Wills. 336; Cro. Jac. 96; 8 Mod. 78; 2 T. R. 28; 7 T. R. 243; 1 Saund. 8, 308; 1 Str. 444; 2 Saund. 59; 14 Ea. 291; 5 T. R. 621; 3 T. R. 68; 8 T. R. 187; 1 Keb. 771; 1 Saund. 298; 4 M. & S. 470; 5 Burr. 2587; Sayer, 116; Cro. Eliz. 646; 1 Burr. 332; 2 Wils. 69; Barnes, 159; 1 Wils. 48; 6 T. R. 122; 2 Taunt. 166.

Per Cur.—Judgment for demurrer.

MACAULAY, J., dissentiente.

DOE EX. DEM. BELL V. REAUMORE ET AL.

In ejectment by the purchaser of lands sold for taxes at sheriff's sale, under 6 Geo. IV. c 7, it is necessary for him to prove that the writ to sell was grounded on the treasurer's return, shewing arrears of taxes for eight years, and that there was no sufficient distress on the lands to levy the amount, and semble, it is also necessary to prove that the land had been "described or granted."

Ejectment for lands in the Home District. The lessor of the plaintiff claimed as purchaser at a sale, for taxes in arrear, under the authority of the provincial statute, 6 Geo. IV. c 7 (1825). At the trial, the plaintiff proved a deed to his lessor for the sheriff, dated the 28th August, 1832, and demand of possession before action brought, of the several persons, and as tenants, was also proved. The sheriff being called, produced the writ under which he made the sale, and he proved that the lessor of the plaintiff was the highest bidder. The premises sold are the east half of No. 16, in the 3rd concession of Markham, 100 acres. The sheriff explained, that in the writ, although the premises are rightly stated to consist of the east half of the lot only, the quantity of land is erroneously set down as 200 acres instead of 100 acres, and he is directed by the writ to levy 3*l.* 5*s.*, whereas it ought to have been only 1*l.* 12*s.* 6*d.* It being a manifest error, he only sold for 1*l.* 12*s.* 6*d.* and expenses, making together 2*l.* 1*s.* This was the plaintiff's case.

The defendant moved for a nonsuit: 1st, because the sheriff sold for a less sum than the writ commanded him to make; 2ndly, because it was not shewn that the taxes were actually in arrear, as stated in the writ; 3rdly, because it should have appeared in the writ, or by other evidence, for what description of rates the land was to be sold, whether for the ordinary general assessment, or for road taxes, inasmuch as the land would not be liable to sale for assessments if it had an occupant at the time; 4thly, because the statute directs that the sheriff shall sell "such part" of the premises as may be necessary for levying the rates in arrear, whereas here he has sold the whole of the premises; that this is not authorized by the words of the act, which being penal in its provisions, must be construed strictly; 5thly, because it is not shewn that this lot was ever in fact,

"described by the surveyor-general as granted by the crown," and it is only in case it has been so described, that it is liable to taxes ; 6thly, because it is not shewn, that at the time this land was sold, there was no distress on the premises, from which the money could have been made, as the statute directs.

The Chief Justice, before whom the cause was tried, at the last assizes for the Home District, reserved these points, as it was the first occasion that had arisen for settling any questions upon the construction of this statute. The defendant then went into his case, and proved that the taxes were not in arrear eight years, as stated in the writ. There was much evidence to prove that in most if not all of the years the taxes had been paid by the occupants of the lot, which was held in several parcels, to the township collectors, although the rolls were not so made out as to shew definitely and clearly that they were paid on this specific 100 acres ; for one year, however, 1827, which was part of the eight years, it did appear plainly by the rolls that the taxes had been paid on the whole of lot No. 16 ; so that it was made out conclusively that the eight years' taxes were not due and in arrear ; and it was further proved that, during the whole eight years, and at the time of the sale, these 100 acres were in the actual possession of a resident occupier, and that there was always abundant property on the premises, from whence the taxes might have been levied by distress.

This case was argued in Easter Term, by the *Attorney General* and *Small* for the plaintiff, and *Baldwin* for the defendants, but judgment was not given till to-day.

ROBINSON, C. J.—Upon the whole case, as it is thus presented, we have no doubt that the lessor of the plaintiff cannot recover. We do not consider the objection first raised tenable. It amounts only to this, that a less sum was actually made than was erroneously stated to be in arrear ; the sheriff's forbearance was in favor of the proprietor. He had authority to do all he did, and something more ; and if there had been no error in the writ, I do not know on what principle his not levying all he was ordered to, can make his act void.

Upon the second point we are of opinion that it was incumbent on the plaintiff to shew, at the trial, that the writ to sell was grounded upon the treasurer's return, declaring the assessments to be eight years in arrear on this particular tract of land, and we think it would be prudent on any similar occasion to shew also that the land had been described or granted.

Upon the third point, we think the writ sufficiently complies with the act, and with the form of execution therein prescribed, in declaring in one gross sum the amount charged against the land for assessments.

Upon the fourth point, we think the reasonable construction is, that the taxes are to be made by selling the smallest part that any one will take, at the sale, or *the whole lot*, if it be necessary.

We are inclined to concur with the fifth objection, as I have already intimated, but we express no positive opinion that such evidence is indispensable.

The sixth objection we are inclined to think is well founded, and that it was incumbent on the plaintiff to shew that there was no distress on the premises, from which the money could be made ; but this objection comes with much more weight when it is clearly proved, as in this case, that there was abundant distress on the premises.

Upon this ground, that it was clearly shewn there was sufficient distress on the premises, and upon the ground that the defendants shewed also that in fact there were not eight years' assessments in arrear, as appeared even from the official documents in possession of the proper officers, we consider the defendants clearly entitled to a verdict.

A contrary opinion could only be advanced by maintaining that the notices and advertisements required by the act, with the time allowed for redeeming, were meant to have the effect of precluding the party for ever, if he omitted to take advantage of them, and suffered his land to be actually conveyed under this statute, however erroneous, unjust or illegal, the proceeding may have been. We think otherwise ; for we do not presume that to have been the intention of the legislature, and if it was, it should have been ex-

pressed ; for it is not reasonable to suppose an instance in which a time is limited for advancing claims, as, for example, in respect to estates forfeited in this province during or since the late war, but there the provisions of the statute are express or unequivocal. There is nothing to that effect to be found in the statute, but, on the contrary, the 22nd section enacts "that no omission of any direction contained in this act, relative to notices, in forms of proceeding previous to any sale under this act, shall extend to render such sale invalid," &c. ; from whence we are at liberty to conclude that the legislature did not mean that a purchaser should hold an estate sold in defiance of all the provisions of the act, and without any substantial foundation to warrant the proceeding. Errors or omissions in form only, are made immaterial to the title ; matters of substance are left to have their just and proper effect. In conveying away the lands of the former proprietor under this statute, the sheriff is exercising an authority given to him upon certain conditions, and that authority must be strictly pursued, or his conveyance cannot be valid. If the land has in fact never been described as granted by the crown, there was no authority for charging it on the treasurer's accounts ; if there were not eight years' taxes in arrear, there was no authority for the return made by the treasurer and the clerk of the peace, and of course the writ made on the foundation of that return is unwarranted ; and if everything else was regular, and the writ had rightly issued, the command of that writ is to sell the land, "provided there be no distress on the said lands respectively from which the said several sums or either of them may be made ; and if there be such distress, then that the sheriff shall levy the same by such distress." If the writ had run in any other form, it would have been void, for the statute expressly requires it to be issued in those terms, and only authorises the lands to be sold when there is no distress.

To sell the land, therefore, when there was ample distress upon the premises, is to act against the command of the writ, not under its authority ; and clearly a sale so made

cannot be supported. It might as well be said, that if the sheriff, on an execution against the lands of A., sells the lands of B., the sale shall be valid, because he seized and sold them as the lands of A., and published the requisite notice of the sale.

The operation of this statute is to work a forfeiture : an accumulated penalty is imposed for an alleged default, and to satisfy the assessments charged, together with this penalty, the land of a proprietor may be sold, though he may be in a distant part of the world, and unconscious of the proceeding. To support a sale made under such circumstances, it must, in my opinion, be shewn that those facts existed which are alleged to have created the forfeiture, and which are necessary to warrant the sale ; for a clerical error, or the wilful or negligent omission of a ministerial officer, shall not deprive a man of his estate.

We all agree, however, that the facts proved by the defendants entitle them to a verdict, and those two points alone are to be considered as the grounds upon which we direct a verdict in their favour.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Postea to the defendants.

REX V. FRASER.

An attachment was granted against a deputy clerk of the crown for having issued serviceable process without authority, and afterwards on his appearance in term to answer interrogatories, the court directed him to be dismissed from his office, and to pay the costs of the proceedings.

The defendant had been brought up on a former day, on an attachment issued against him for a contempt, under the following circumstances. It appeared the defendant was an agent for the Canada Company, in the district of Bathurst, and was also deputy clerk of the crown in that district. He, as agent for the Canada Company, sold a lot of land to one Scott. Another person, however, had made an application to the agents of the Canada Company, in York, and had obtained from them a license of occupation for the same lot. With a desire to assist Scott in obtaining the lot of land, to which he thought him entitled, for some

reason, to the preference, the defendant issued a *capias ad respondendum* not bailable, at the suit of Scott, against the complainant (Le Fevre), and had it served upon him. At the same time defendant wrote a letter to Scott, informing him what he had done, stating that he had spoken to different attorneys in his neighborhood not to interfere, and saying that if Scott had any cause of action against Le Fevre, he might carry it on under this process, and he might threaten him, unless he would give up the land ; but if he had no cause of action, the thing must drop, as defendant tried this as an experiment. Le Fevre employed an attorney, and an appearance was entered, and subsequently, these facts coming to light, *Draper*, on affidavits shewing them in full, obtained a rule nisi, and subsequently an attachment against the defendant, who was dismissed from the office of deputy clerk of the crown. On the first day of this term, the defendant surrendered himself, and was allowed to go at large on his own undertaking to appear *de die in diem*. Interrogatories were administered to him, which he answered in open court upon oath ; the clerk of the crown reading the interrogatories. And now the court gave judgment, as follows—the Chief Justice pronouncing the judgment of the court.

ROBINSON, C. J.—You have been brought before this court upon an attachment to answer for an alleged contempt, in having, as one of its officers, issued the process of this court in a supposed suit, without anything to authorise you ; and in having made an unwarrantable use of that process, advancing it as an experiment, for the purpose of inducing the person against whom it was issued to abandon a claim to a certain lot of land. In your exculpation, you have urged two matters as entitling you to the favourable consideration of the court. First, that you were actuated by no sordid desire to benefit yourself ; but adopted the proceeding complained of for no other purpose than to deter another from an act of injustice and oppression which you conceived he intended to commit, in a matter in which you had yourself no personal interest, and in which your interference was prompted only by good feeling. And secondly,

you have urged that this complaint is no in reality brought against you by the person who alone could have suffered from the proceeding (if any person could), but that the matter is brought officially under the notice of the court for no purpose of public justice, but to gratify a vindictive feeling entertained against you, by a person wholly unconnected with the matter.

With respect to your motive—undoubtedly if you had made this improper use of your power, to issue the process of this court for the purpose of promoting your own interests or inflicting injury on another, it would greatly have aggravated your misconduct. We are willing to suppose neither motive prompted you, and that your whole object was to save this person Scott, whose cause you chose to expouse believing it to be just. That it was just to the full extent you have stated, we should do wrong in assuming, until Le Fevre had had an opportunity of shewing whatever he might desire to shew, in answer to your statements; but we will suppose it to have been so, and thus place your act in the most favorable point of view it will bear. Still we cannot but see that your conduct has been highly reprehensible. What you did, and why you did it, is to be learned most satisfactorily from your letter to Scott, written while the transaction was recent.

Now consider for a moment what was your plain line of duty as deputy clerk of the crown. It was, among other things, to issue writs upon proper authority, that is, upon a præcipe filed with you, signed by some attorney of this court, or by a suitor in his own behalf; and to deliver the writ to the person applying for it. In this case you issued a writ, without a præcipe from any person; and you did this not negligently, or inadvertently, but designedly. And you inform the person in whose name it ran, that you had done it as an experiment, in order to induce his opponent to forego a particular advantage that he had gained. You state of your own suggestion an imaginary cause of action, and you tell the nominal plaintiff, in this fictitious action, that if the defendant allows it to go on, it must, of course, be dropped, unless he happens to have some real cause of

action. You hint to him also some pretended causes of action that he may advance, in order to intimidate his opponent ; and you add that you have made such arrangements with all the attorneys, and with the sheriff's officer, as would assist to carry into effect the plan you had laid. If such experiments could be tried with impunity, what respect would be paid to the process of this court, and what confidence could be placed in the proceedings of courts of justice ? It is hardly probable but that your principal, the clerk of this court, may have come to the knowledge of various cases, in which he believed or knew that some one individual desired to take an undue advantage of another ; but do you imagine it could ever enter into his mind that he would be justified in endeavoring to prevent or to redress such injuries, by instituting fictitious actions, as contrivances to prevent those persons from prosecuting their own claims, whether justly or unjustly ? You may perhaps think that the circumstance of your having been partially cognizant of the transaction which affected these two parties, made it mere excusable in you to interpose in this extraordinary manner ; but it is far otherwise. Your connection in the matter should have made you abstain the more scrupulously from resorting to means which your official character accidentally placed within your power.

In your answers to the interrogatories administered to you, you ascribe the complaint which has been preferred against you, to the vindictive desire of some person to injure you. We do not inquire upon what foundation that may be asserted, for it cannot affect our view of the matter which you have been called upon to answer. Many persons have the misfortune to have enemies, but the best security against their attacks, is to be able to defy their efforts to bring to light anything in our conduct that can be thought unworthy. We cannot pass unnoticed a proceeding so manifestly tending to throw discredit upon the course of public justice, from any regard to the purposes for which it may have been enforced ; and besides, it would be difficult indeed to reconcile it to one's sense of propriety, that any one should know of so unwarrantable a perversion of duty

in a public officer, and forbear to represent it at least to the principal under whom he served.

When this matter, which we much regret, was first disclosed to us, upon the reading of your letter in open court, it admitted of no doubt that it was necessary to restrain you from any intervention as a public officer in the proceedings of this court, while the imputation which it conveyed was unexplained. The letter itself seemed to forbid any hope that it could be explained so as to warrant us in authorizing your return to office, and we now feel it to be impossible. Under a favorable impression of your character, independently of this transaction, we allow ourselves to hope that your error may have been more an error of the head than of the heart; and we give way so far to this impression that we forbear to impose any further punishment than to direct finally, that you be no longer employed in the office of deputy clerk of the crown for the district of Bathurst. We trust that no one may be led by your example to attempt a similar contrivance, and that you are yourself now fully sensible of your error. The lenity exercised by this court towards you, arises from their impression of your former character, and from their approbation of your having voluntarily presented yourself to answer to this charge, and not because we think the charge is in itself a light one, or that you are by any means acquitted of it by the explanations which you have offered. We have had some difficulty, indeed, in reconciling to ourselves so moderate a course; but we trust we are not deceived in supposing, that to a gentleman of your reputation and standing in society, the regret which must be felt at having exposed yourself to the just reprehension of this court, will of itself be no inconsiderable punishment.

Afterwards, the question of costs being mentioned, on the last day of term, the court ordered the defendant should pay the costs of the attachment, and of the suit brought against Le Fevre.

WALKER V. BOULTON.

Where A. purchased plate of B. of the value of 70*l.*, and directed him to have his crest engraved on it, and afterwards to forward it to his place of residence, but paid no part of the purchase money, nor any earnest, and B. having obeyed his orders, brought an action against him for the price, A. having refused to receive the plate, saying that it was not the same as he had purchased : *Held*, that A.'s directions for the engraving of the crest, and the forwarding to his place of residence, constituted a sufficient acceptance and delivery, to take the case out of the seventeenth section of the Statute of Frauds.

Assumpsit for goods sold and delivered. Plea : tender as to part and non-assumpsit as to the residue. The tender was admitted. On the trial, the plaintiff rested his case on evidence taken under a commission in Montreal, where the cause of action arose. Two clerks of the plaintiff were examined upon interrogatories and cross interrogatories, filed by the defendant. A bill of sale or account of goods stated therein to have been sold by the plaintiff, a silversmith in Montreal, to the defendant, accompanied the interrogatories, and was referred to in them. It was evident, from the course of the examination and cross examination, that the contest between the parties to this suit related solely to four silver-plated corner dishes, which in that bill or parcels of account were charged at 70*l.*, and which the defendant resists paying for ; refusing also to pay a charge of 3*l.* 10*s.* in the bill, for engraving arms, crest and motto, on the dishes. The whole bill amounted to 135*l.* 2*s.*, the other charges being for lamps, and different articles of that kind, with a charge at the foot of the bill of 17*s.* 6*d.* for cases and packing.

The evidence of the plaintiff's clerks went to prove that in the month of September last, the defendant, who ordinarily resided in York, was in Montreal, and called on several days at the plaintiff's shop, and purchased different articles mentioned in the bill ; that on the first, or one of the first occasions of his calling, he selected four silver-plated corner dishes, but afterwards, on another day, called again and selected another set instead of them ; that he called in all three or four times, in the space of as many days, before he completed his purchases, buying some things at one time and some at another. Whether the dishes, as finally selected and determined, were the last

things purchased, is not certainly stated ; but at the time they were chosen and decided on, the defendant directed the plaintiff to have his arms, crest and motto, engraved on them ; and that as soon as they were engraved, the several articles should be packed and forwarded to him. It was further sworn, that immediately upon the plaintiff's selecting the dishes, they were set aside for him, labelled with his name, and sent to the engraver, to be engraved as he directed ; and that, as soon as they were engraved, they were packed up and forwarded to the defendant, at York, through one of the forwarders, the plaintiff having promised the defendant that he would forward them as expeditiously as possible and as soon as they were ready. This was the substance of the plaintiff's evidence. It was admitted that the set of vegetable dishes was forwarded by plaintiff to defendant, in a case with the other things purchased, and that they came to defendant in the month of November. After the plaintiff had gone through his case, the defendant, who conducted his case in person, took a legal exception to the plaintiff's right to recover, on the ground that the case was within the 17th section of the Statute of Frauds, and that an agreement in writing, or note, or memorandum of an agreement in writing, was necessary to sustain the plaintiff's action. The Chief Justice, who tried the cause, took no note of such an objection being formally moved as a ground of nonsuit, or being raised at all before the defendant went into his case, as the defendant expressed his wish to go to the jury. The defendant called a gentleman, who proved that, in September last, he had called at the plaintiff's shop, at Montreal, with the knowledge that the defendant had been making some purchases there, and had asked the plaintiff to shew him the set of dishes which the defendant had selected. This, it appeared, could not have been later than the next day after the defendant had first called at the plaintiff's shop. The plaintiff shewed him a set of dishes, which he said were those the defendant had selected, and they were certainly not those sent up to defendant, and which were produced by the defendant in court, at the trial, but they were much handsomer and of different workmanship.

A comparison of this evidence with that of the plaintiff's witnesses, tends to shew that it must certainly have been after this visit of the defendant's witness to the plaintiff's shop that the defendant changed his mind, and, giving up the set he first chose, selected another. Whether that other was the set which was afterwards forwarded was the question, and the only one. To corroborate the inference that they could not have been the same, the defendant called two tradesmen, and shewed them the dishes which he had received; and they declared that they were not such as ought to be charged at 70*l.*, but were inferior articles, scarcely worth 40*l.*

To shew also, that he had given early notice of his refusal to accept them, he desires his letter to the plaintiff might be produced, and it was handed in and read. It amounted to an admission that he had ordered of plaintiff in September, and had actually purchased, a set of side dishes, for the same purpose as those sent, but far handsomer, and it calls for an account or bill of the articles. At the trial, an account or bill was handed in by defendant, shewing that the sum tendered covered the whole amount excepting the cost of the dishes and engraving. This bill has the plaintiff's name printed at the top, and expresses to whom the articles were sold, and in the bill is charged one set plated silver-edge vegetable dishes, 70*l.* Engraving arms, crest and motto on ditto, 3*l.* 10*s.* After the judge had charged the jury, but before they retired, the defendant desired his objection, founded on the Statute of Frauds, might be noted, and the Chief Justice then took it down. The jury found for the plaintiff, damages 73*l.* 10*s.*

In Easter Term last, the *Attorney-General* obtained a rule *nisi* to set aside the verdict and enter a nonsuit, which was answered during the same term by *Draper*, for the plaintiff. The judgment of the court was this day given.

ROBINSON, C. J.—I think the defendant's objection was intimated when the plaintiff closed his case, and my reason for not noting it particularly was, that I did not conceive the objection lay, and should certainly have overruled it, if it had been pressed to a decision; and I perfectly well

remember, that the defendant had evidently no desire that the case should go off at the trial on a mere legal exception, but on the contrary, he evinced and expressed a desire that it should be determined by the jury whether he had or had not just cause for resisting the payment of the sum of 73*l.* 10*s.*, objected to in the account. The ground of his objection was, that the dishes sent him were not those he had selected, but a very inferior set; that he had at once, on receiving them, objected to accepting them, and had immediately written to the plaintiff to that effect.

To prevent the possibility of injury to the defendant from any misapprehension of mine, I would, however, treat his exceptions as urged at the proper time as grounds of non-suit, and as if noted by me at that time, in order that he might have liberty to move in *banc*; but all the defendant said and did afterwards, was said and done voluntarily, and must, I think, be considered with reference to any effect it ought to have in disposing of the exceptions he had before raised. I must add, that while I was remarking to the jury upon the effect they should give to the evidence adduced, respecting the real value of the dishes, the defendant fairly avowed to the jury, that for the dishes he bought, he undoubtedly agreed to give 70*l.*, but these were not the dishes, and that he had given evidence of their actual value only for the purpose of shewing they could not be the same.

At the trial, I was strongly impressed with the opinion, that this case could not come within the Statute of Frauds. Another question occurred to me, which it may be proper to consider now, namely, whether the defendant, after the cross examination into which he entered under the commission, and after the course taken at the trial, can be allowed to avail himself of the objection that there was no contract in writing; and if the statute applies in this case, and the defendant is not precluded from urging it, it can only then remain to be enquired, whether there was not in fact such evidence in writing as satisfies the exigency of the statute.

Upon the first point, the defendant cross-examined the plaintiff's witnesses cautiously, not expressly admitting

anything, but desiring them to state the particulars of a transaction he speaks of ("if such a transaction ever took place"); and he only endeavours to sift the statements which he supposes the witnesses may make, in answer to the interrogatories in chief. I cannot see that any admission of an agreement is distinctly involved in them. But having moved for a non-suit (if that is admitted to have been done) for want of a written agreement, and that point not being determined, the defendant goes into a defence, and states fully to the jury the particulars of a bargain between him and the plaintiff, for four silver-plated dishes, which he admitted he bought of plaintiff in September last, and was to pay him 70*l.* for, besides the engraving, which he directed to be done. He then discloses his defence, on the merits, which he declares to be that the dishes were not the dishes he bought, and therefore he rejected them, as he had a right. If they had been the same, he advanced no pretence for not accepting them, as he did the other articles, sent with them ; and to shew these were not the dishes, he produced a witness to prove that he saw, in September, the four dishes which "the plaintiff told him he (the defendant) had bought;" and these, the defendant contended, were the dishes which he actually bought, and was to pay 70*l.* for. That he did buy different dishes from those sent, he endeavoured to prove by the witness called by himself, and he added other evidence to shew that the dishes sent were not of such value as he agreed to give for those which he contended he had bought. That was therefore, in fact, the whole question on which he rested his defence before the jury—the mere question of identity of the article ; and that question, no written agreement such as is usually entered into on these occasions, would have solved. I have great difficulty in thinking that a defendant, after going to a jury upon such a case, can revert to an objection that the jury have no legal evidence that he made any bargain with the plaintiff for silver dishes. The jury are to try questions on which the parties differ ; matters disputed and in issue. If it stood denied before them that the defendant bought four dishes of the plaintiff, then they were to try the fact,

and try it only upon such evidence as the law allows. Now if this case required a note, or agreement in writing, I see clearly that it would not do to allow the plaintiff to give evidence of the defendant's parol admission before the trial, that he had made such a bargain, because that would let in the very kind of evidence which the legislature thought it was unsafe to admit, in respect of alleged contracts of this kind. But a defendant may, in court before the jury, dispense with a protection which the law allows to him. *Quilibet potest renunciare jus pro se introductum.* The jury can have no difficulty in believing himself in his own cause ; and if he had stood up and said, "I am aware you could not recover against me, without proving a bargain by a note in writing, but I waive that : I admit that I did buy four dishes of the plaintiff, and if they were sent me, I would pay for them ;" would not the jury afterwards be warranted in confining their inquiry to the mere question, whether they were the same or not, the purchase of four dishes, and the price to be paid, being admitted ? Now here he does not waive it, but desired to hold the legal objection, and also to go to the jury upon facts which necessarily implied a bargain and sale, and left only the question of identity to be determined by parol evidence; and respecting this he brought himself parol evidence, as well as the plaintiff.

The plaintiff sues for goods sold and delivered, generally, describing no specific article ; the defendant objects, you must shew by writing that I bargained with you for the goods you are suing for ; and then he adds, I did bargain with you for goods, and you sold me goods to the value of 70*l.*, but you did not deliver me those goods. The bargaining and selling, however (that is the contract), is all that is required to be proved by writing; the delivery may be proved by parol; and "I prove by parol evidence," the plaintiff might say, "that I did deliver you goods of the kind which you admit were bargained and sold. If the jury are convinced I delivered the very goods which you admit I sold to you for 70*l.*. you had no right to reject them, and the case is made out : if they do not find this, the bargain and sale,

which is not disputed between us, was not perfected by the delivery of the goods, and falls to the ground."

Lord Mansfield says (1 Bl. Rep. 600) : "When a man admits the contract to have been made, it is out of the statute, for here there can be no perjury." And this certainly seems reasonable. Nevertheless, on a careful examination of the opinions expressed in *Rondeau v. Wyatt* (2 H. Bl. 68; 2 Br. Ch. Ca. 565; 1 Bing. 9), the case upon this question of admission of the contract by the defendant would seem to be doubtful. I have been the less studious to come to a satisfactory conclusion on this point, because, on the main question, I do not think the verdict can be disturbed. The case is not, in my opinion, within the Statute of Frauds. The decisions reported upon the 17th section of the statute are exceedingly numerous, both in respect to the facts which bring a case within the exceptions mentioned, and also in respect to what shall be a sufficient memorandum or agreement in writing, when that is required. Many of the first class of cases cannot, I think, be reconciled, and at all events I do not pretend to reconcile them ; but, as I understand them, there is no case of established authority that would shew such a transaction as the present within the statute. It is clear that *Kent v. Huskinson*, 3 B. & P. 233, is very distinguishable. The defendant there had not seen the goods, he had merely ordered them, and never had approved of their quality. When they came to him, he rejected them, saying they were not such as he ought to have for the price he agreed to pay. The court say, "he never before had an opportunity of accepting or rejecting, and now, when he does reject and a dispute arises, how can we know who is right, unless we have evidence of the kind of sponge he agreed to buy, whether best, or second best ? &c.; and as there had been no earnest and no acceptance, evidence in writing of the agreement was indispensable."

At the argument, Owenson & Morse, 7 T. R. 64, was cited : and it may have appeared in point to shew that the defendant in this case having his arms and crest engraved on the dishes, was no acceptance. But, clearly, it has no application here. In all these cases, upon the statute, we

must consider how the question arises—who it is that seeks to enforce the contract, and for what purpose. The point in the case last mentioned was whether the *vendor*, by allowing the vendee's arms to be engraved on some plate bought of him, had so conclusively delivered it to him, that he had lost his lien upon it; for the vendor, relying upon that circumstance, endeavoured in this action, which was trover to recover the value of them from the vendee, who never had let them out of his possession, although he had not paid for them otherwise than by notes of a banking-house, which failed before they could be presented.

It can never be argued from that case that if the vendor, after he had received the plate from the engraver, had sent them to the vendee, he could not sue him for goods sold and delivered, though the latter might refuse to take them.

The cases are too numerous to refer to them particularly. The following are the most material of the modern cases, and some of them seem, upon the first perusal of them, to support the argument for the plaintiff; but besides the difficulty of reconciling them to decisions of which the authority seems never to have been denied, none of them, in my judgment, bring this case within the statute.—3 B. & C. 1; 3 B. & A. 223; 1 B. & C. 156; 2 B. & C. 37; 5 B. & A. 855; 3 B. & A. 684. The dispute here, we see, turns upon the identity of the articles. It is no argument that the statute must apply, because that is left, in this case, to be ascertained by parol evidence. The statute can in no case prevent it. If earnest had been paid, or if one of these dishes had been accepted and brought away, or if the defendant had ever signed a writing, declaring that he had bought of the plaintiff four silver dishes for 70*l.*, still when they were sent, he could deny that they were the same dishes; and although the statute would have been fully complied with, the parties must nevertheless have been left to contest that point on parol evidence. No writing can guard against that. If even a description of the articles were attempted in it, as to their design and materials, the defendant could say they were smaller or lighter than those he bought, or in short that they were not the same. Now I

consider that when a purchaser has himself selected certain articles, and had his name engraved on them, he cannot afterwards reject the same articles for defect in quantity or quality. The sound principles to be deduced from all the cases, are in my opinion these: If the purchaser himself selects the goods, he says he will take those specific goods at a specific price, and even has his name engraved upon them, all that is wanting to make the contract complete is for the vendor to deliver the goods to him; that is, to deliver them conclusively as against himself, so that he no longer retains a lien upon them, or a power over them. When he does this, the case is out of the statute, and the purchaser has it not in his power to throw the case back upon the statute by capriciously refusing to receive the goods. If they are not the same goods he bought, he never could be prevented from rejecting them, because he entered into no contract respecting them; but if they are the same goods, he cannot repudiate his purchase, having once exercised his judgment upon them, and accepted them, and the seller having delivered them to him. Whether they are the same goods or not, if that question is raised, must be tried by the jury by the general rules of evidence. The statute has nothing to do with it. Suppose a purchaser should go from this province, and select in London a hundred volumes of books, and write his name in each of them; and having agreed upon the price, direct them to be sent out; the vendor complies, and ships them, consigned to the vendee, and thus parts with his lien. I have no idea that the power remains with the vendee, when they reach him, to say I will not accept them, and you cannot sue me without an agreement in writing, because there is no acceptance without delivery. No case that I have seen goes that length, and if any seems to do so, I should be convinced it was from inaccuracy in the expression, unless the point in judgment required an opinion to be declared on that question. He might doubtless say, as in this case, they were not the same books, and put the vendor to prove it as he could. If they are the same books, the statute is satisfied. The question turns entirely on this: Can there be an accept-

ance before the final delivery by the vendor? however conclusively the vendor has accepted before, must he accept again, *after delivery?*

That he may accept, by actually buying in person, and that the vendor's afterwards delivering the goods, so as to part with all power over them, and the vendee's receiving them, completes the contract, I infer from numerous cases, (1 Camp. 233; 5 Pr. 630; 3 B. & A. 321; 4 M. & S. 262; 7 Taunt. 597; 3 B. & P. 233; 5 B. & A. 559; 3 B. & C. 681,) and I think Mr. Starkie, in his Treatise on Evidence, 2nd vol. 611, seems to draw the same inference from all the cases which I have already cited, and which decide that a constructive delivery, as the sending the goods by a common carrier, though appointed by the vendee, implies no acceptance. He says, "the rule now is that, so long as the buyer continues to have a right to object, either to the *quantum* or the *quality* of the goods, there can be *no acceptance* of the goods;" and that so "long as the seller retains a lien on the goods, there can be no recovering of them, under the statute, by the vendee." The most modern decisions carry the doctrine certainly that length, but they go no further; and as they seem to me to have gone beyond preceding authorities, in a strict construction of the statute, I mean more especially the cases in 5 B. & A. 855, and 1 B. & C. 27—I would certainly not go beyond them. They do not go so far as this case; they establish to the very utmost this principle, that upon a bargain for the purchase of goods of greater value than 10*l.*, the statute applies until the agreement is carried into effect on both sides, so that both parties can treat it as concluded. The seller continues to have his lien for the price, in general, until he has delivered the articles to the vendee, or to a carrier for him. While they are undelivered, the vendee cannot bring trover against him for them; and as he has not his remedy, as upon an executed contract, they hold that by consequence the vendor shall not have his remedy, and shall not be able to sue for his money, so long as he retains a hold of the goods, unless he can shew some agreement in writing, the terms of which enable him to do so; and while things remain in this state,

he may have a right to say he will not accept. An acceptance, it is true, to come within the statute, must be with a view "to the ultimate affirmation of the contract." So I think we must hold this to be, when the defendant ordered the articles to be engraved with his arms. The plaintiff promised, when this was done, to forward them without delay. The price being known and understood, he did so, subject only to the doubt whether they are the same, which never can affect the application of the statute; and he did it in that manner, that he parted with the possession wholly and unreservedly. He had therefore done all. The defendant received them, and, in my opinion, he cannot keep the contract open by refusing to accept a specific article which he had already accepted, and which was sent to him at his request. If he had merely ordered the goods, and had never before seen them, he might then have rejected them. The words of the statute are, unless the buyer shall "accept part of the goods so sold, and actually receive the same." If acceptance could in no case precede the ultimate delivery, then it was idle and unmeaning to add the words "and actually receive them." The two taken consecutively, as they stand, seem to me to imply that, although he may have accepted by declaring the assent of the mind to take those specific goods, that is nothing unless he *actually* receive them.

As I think the statute no longer applies to this bargain, it is not necessary to consider whether any agreement, or note, or memorandum of an agreement, sufficient to comply with the statute, is furnished by the evidence given at the trial. Taking the defendant's letter in conjunction with the account furnished by the plaintiff, and produced on the trial by the defendant, without objection to its contents, I am not satisfied there was not: but to shew there was, would require an examination of the case that need not be entered into unless the statute were admitted to apply.

SHERWOOD, J.—By the 17th section of the Statute of Frauds, it is enacted "that no contract for the sale of any goods, wares, or merchandizes, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer

shall accept part of the goods so sold, and shall actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing be made and signed by the parties, to be charged by such contract, or their agents thereunto lawfully authorised." In the present case, nothing was given in earnest to bind the bargain, or in part payment, and there was not a sufficient note or memorandum in writing of the bargain ; the only question therefore which remains to be decided is, whether the defendant accepted a part of the goods and actually received the same. The decisions upon this part of the statute have been contradictory.—14 E. 358; 1 Camp. 233. Some of them hold that a constructive delivery is sufficient, under particular circumstances ; while others seem to repudiate that principle, and to consider an actual delivery necessary, whenever the goods are capable of delivery.—7 T. R. 142; 3 B. & P. 133. The latest decisions, however, establish this doctrine—"that there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee ; and there must be an acceptance of the vendee, with an intention of taking the possession as the owner."—8 T. R. 330; 5 B. & A. 557, 859; 2 B. & C. 511; 3 B. & C. 1, 423. It was proved in this case, that the defendant, some time in September last, went to the shop of the plaintiff, in Montreal, and selected a set of plated silver-edged vegetable dishes, and agreed to buy them. The manner of selection was as follows : One of the dishes was in the shop, and the other three in a store-room in another part of the house, but the four were alike. The defendant saw but one, and he approved of the other three by that sample, and directed the plaintiff to send the four dishes to an engraver, and have his arms, crest and motto, engraved on them ; and as soon as that was done, to deliver them to a carrier to forward to York, Upper Canada, for him. The plaintiff agreed to do so, and immediately sent the dishes to an engraver, who engraved the arms, crest and motto, of the defendant upon them ; and then the plaintiff placed them in the hands of a forwarder, for the defendant, to be sent to York, in Upper

Canada. The goods arrived safely, but the defendant, upon inspection of them, thought they were not the same which he bought, and refused to keep them.

These facts clearly prove, that the defendant had an ample opportunity to examine the quality, workmanship and appearance of the dishes, and consequently that it was not at all necessary he should see them again in order to form a correct opinion of them, or to determine whether they would suit him. They further shew, that the plaintiff obeyed the orders of the defendant, and delivered the whole of the goods to a carrier for him, for the purpose of being forwarded to Upper Canada. When the carrier received the goods for the defendant, according to his order, the defendant himself must in law be considered to have received them ; and it appears to me, the delivery to a third person, by the order of the defendant in this manner, puts an end to all doubt. Before delivery, everything rested merely in parol. The plaintiff had a right to retain the goods till the price was paid ; but the moment the delivery took place, in pursuance of the vendee's order, the property and right of possession changed from the plaintiff to the defendant, and the plaintiff no longer had a legal lien for the price because the vendor's right of stoppage *in transitu* does not affect the present question. The defendant accepted, and actually received the goods, because they were delivered to a carrier by his order after he had seen, examined and approved of them ; and therefore no right of objection, as regards the quantity or quality of the goods, remained with the defendant ; he had fully exercised that right before he gave the order for their delivery to the forwarder.

The legislature, in my opinion, did not intend to use the word "accept" and the word "receive" as synonymous terms in this statute ; for if they did, the latter would be a mere expletive, and wholly useless. To *accept* sometimes means to approve of, and nothing more ; as to *accept* an offer or a proposal, or to *accept* a bill of exchange ; and this is the sense in which it is used in this act, according to my view of the matter. The statute says the sale shall not be valid, "unless the buyer *accept* part of the goods so sold,

and actually receive the same." The defendant, perhaps, might have changed his mind, and might have refused to receive the goods before they were delivered to the carrier, according to his verbal order; but after such delivery, I think he was too late to raise any objection either to the quantity or quality of the goods.

At the trial, the defendant adduced evidence to prove that the set of silver-edged dishes sent to the carrier for him, and forwarded to Upper Canada, was not the same set which he selected and directed to be sent to the forwarder. Had he established the fact that they were another and a different set, then, indeed, the plaintiff must have failed in his action; but the jury found they were the same set which the defendant purchased, and therefore I think the plaintiff is entitled to judgment.

MACAULAY, J.—Under the circumstances of the defence made at the trial of this cause, I do not think the Statute of Frauds should be allowed to be urged now (even if a valid ground of exception) against the finding of the jury, unless leave were expressly and unequivocally reserved by the Chief Justice in that behalf. A new trial being discretionary, should not be granted on any such objection, after a defence founded on a contract, and involving merely the identity of the article—a point which would not necessarily have been obviated by any note or memorandum of the bargain, payment of earnest, &c., or by any of the ceremonies prescribed by the act. A nonsuit cannot be ordered, unless leave was explicitly reserved to move it with the assent, express or tacit, of the plaintiff. The objection seems to have been but feebly urged, and to have been noted by the court rather to shew that it had been made at the trial, and so far to avail the defendant in any ulterior stage of the cause, than as a doubtful point submitted for decision, as striking at the foundation of the suit, and reserved for future consideration, apart from the merits, and upon the result of which point the verdict was to depend.—*1 Taunt.* 10; *6 Taunt.* 336. In this case, therefore, I concur in rejecting the present application, as, having been waived by the defendant at the trial; or if not

as merely noted in order that upon renewing the objection here, it might be shown to have been taken at nisi prius, and not as forming a point reserved, in the strict meaning of the term. But if the defence had been rested upon the statute, I am not prepared to say that it could not have been sustained. I, however, shall abstain at present from expressing any positive opinion upon that point. The late cases seem to determine that there must be an actual or constructive delivery, to which is to be superadded an acceptance and receipt, a change of possession, parted with by the vendor, and acquired by the vendee as owner.

The Statute of Frauds was passed for the prevention of frauds and perjuries, and is thus introduced : " For the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury." The 17th section enacts, "that no *contract* for the *sale* of any goods, &c., for the price of 10*l.* or upwards, shall be *allowed to be good*, except the buyer shall accept part of the goods *so sold, and actually receive the same*, or give something *in earnest*, to *bind the bargain*, or in part *payment*, or that some note or memorandum of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." The 17th varies from the 4th section in two points. The 4th section provides that *no action* shall be brought, whereby to charge the defendant upon *any contract* or sale of lands, &c., whereas the 17th section declares that no contract for the sale of goods shall be *allowed to be good*. The 4th section requires the agreement, or some note or memorandum thereof, to be in writing ; the 17th requires a note or memorandum of the *bargain*. In this case *no earnest* being given, or *part payment proved*, it rests upon the two other clauses of the 17th section. There was no note or memorandum in writing of the *bargain* proved, unless it be contained in the defendant's letter. The letter is insufficient, as not shewing the price of the articles, or specifying what the defendant agreed to purchase in point of number or quantity, and asserts a quality ordered different from the articles furnished by the plaintiff ; and it does not refer to and cannot be connected with

any other document, to supply the defects. It *calls for an account*, and does not advert to any already received, specifying the number and price of the articles, and if it did, the quality is disputed ; in other words, the identity, the things themselves are denied to be the same. And even had the account been received by defendant, and been referred to in his letter, I do not think it would have helped the case, so far as it might be offered in proof of a contract for the articles in dispute ; for although it admits a contract for some articles, it expressly declares those forwarded not to be the same. The letter contains no recognition of a contract for these articles, unless a repudiation of any such agreement constitute a recognition. The whole must be taken together, and disaffirms the purchase it is offered to prove. The interrogatories and cross-interrogatories do not supply the deficiencies.—6 Ea. 307 ; 5 B. & C. 583 ; 8 D. & R. 343 ; 5 Ea. 10 ; 1 Smith, 299 ; 4 B. & A. 595 ; 6 Moore, 86 ; 3 B. & P. 14 ; 3 Bing. 107 ; 9 Ea. 348 ; 3 Mer. 441 ; 3 Bro. C. C. 161, 319 ; 3 Taunt. 169 ; 1 Bing. 9 ; 7 Moore, 219 ; 6 B. & C. 437 ; 2 B. & P. 438.

Then did the acceptance of the other articles in the account operate as a part acceptance of the whole. It does not appear to have been a joint purchase, and, if it did, it is clear the defendant did not accept a part in the name of the whole, or as a part at all. He accepted certain articles and rejected others. The cases are satisfactory to shew that where a part acceptance is to bind, it must be in the name of the whole.—Roll. N. P. C. 178 ; 5 Esp. 267 ; 7 Ea. 558 ; 3 Smith, 528 ; 1 Stark. N. P. C. 447 ; 7 T. R. 142 ; 2 D. & R. 297 ; 1 B. & C. 156.

The next inquiry is, whether the selection at Montreal, by the defendant personally, and the subsequent transmission, amount to an acceptance and actual receipt ; i. e., whether the selection constitutes an acceptance, and the delivery to the carrier an actual receipt, within the statute ; or whether the delivery to the carrier did, under the circumstances, amount in itself to an acceptance and receipt. In other words, whether the *acceptance* under the statute could be posterior in point of time to the delivery by the vendor

and actual receipt by the vendee ; and if not, whether a delivery according to order to a common carrier involves both, or is tantamount to an acceptance and receipt by the defendant, within the meaning of the statute. It is laid down as a rule in the cases, that there can be no acceptance so long as there remains anything to be done by the vendor, before the article is ready for delivery. The purchase here was apparently conditional, that the plaintiff should engrave the defendant's arms. The dishes were not ready for delivery until engraved, nor could the whole price be known till then, though, as an article of merchandize, they were *per se* complete and ready to be delivered to any customer ; and it was the defendant who desired something to be superadded. It might well be contended that, if in other respects complete and conclusive, the engraving was an addition peculiarly calculated to designate the property as the defendant's, by a special mark of his own. It is another rule, and in this case a more forcible one, that there can be no acceptance so long as the vendee is entitled to object to the quantity or quality of the goods. In this case, the defendant purchased, by a pattern or sample dish, not having seen three or four. I do not clearly see how his right to except to the quality of the absent three was compromised by his approving one, should they upon actual tender not correspond in pattern, workmanship or quality ; a right he would be precluded from after an acceptance, though they differed in these respects, and even the engraving might have been so inaccurately or badly executed, as to spoil the appearance, or greatly deteriorate the value of the goods. Was the engraving an act performed on the defendant's or plaintiff's property ? In the latter case, it would seem the defendant might reject the article on that ground ; in the former, his relief would consist of an action for the unskilful execution of a work undertaken to be performed by the plaintiff on defendant's property.

Apart from these is the general question, whether the defendant accepted the dishes under the statute. It is in this view conceded that he bought the identical articles in dispute by the pattern dish ; desired his arms, &c., to be

engraved, and the things to be sent to him at York : to all which the plaintiff assented, but nothing was said as to the price—it was, as far as appeared, a ready-money bargain. By promising to forward, plaintiff did not agree to waive his lien, and forward at all events, or to deliver at a future day expressly. The parties separated without any explicit understanding as to payment. It is therefore to be considered, in what position the parties stand at common law and under the statute. In Roberts on Frauds, 165, it is asserted, that a bargain and sale of a chattel, where no future day was assigned between the parties for the delivery and payment, unless earnest was given to bind the bargain, required a simultaneous or consecutive payment or delivery to fix the contract and transmute the property ; for if the sale was immediate, and the buyer made no payment or tender, the owner was at liberty to dispose of the goods, before payment, &c. Before, as well as since the statute, payment was always considered as perfecting the bargain, so as to preclude the retraction of the one without the consent of the other, and to give to the buyer an action for the goods, and to the seller an action for his money, the property being changed by such payment and earnest, however small the sum.—Noy's Max. c. 42 ; Dyer, 30, 76 ; Hob. 41-2 ; Plow. 432. If I say I will sell my horse at 20*l.*, and a person offers to buy it at that price, but does not presently tender the money, it is no contract ; and though he came again with the money, I may accept or refuse it, or demand a larger sum, at pleasure. If he had proceeded forthwith, upon the price being named, to count the money, the party could not have retracted.—Touchst. 222. If a man by word of mouth sell to me his horse or any other thing, and I give or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sell me a horse or any other thing for money or other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is appointed for the payment of the money, or all or part of the money is paid in hand, or I give earnest money to the seller, or I take the thing bought by agreement into my possession ; where no

money is paid, or earnest given, or day appointed for payment—in all these cases there is a good bargain and sale of the thing to alter the possession thereof.

Though by payment of earnest, the property vests in the vendee, it is not absolutely, but subject to the right of possession in the vendor, as a lien for the price.—Roberts, 167. The earnest only binds the bargain, and the Statute of Frauds gives no new efficacy to the payment of earnest.—2 Com. 446. A transferring of goods is called a *sale*. If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them, for it is no sale without payment. If the vendor says the price is 4*l.*, and the vendee says he will give it, the bargain is struck, and they are neither of them at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest (which the civil law calls *arret*, and interprets it to be *emptionis venditionis contractæ argumentum*), the property of the goods is absolutely bound by it, and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to earnest, as an *evidence* of a contract, that by the Statute of Frauds, no contract, &c., shall be valid, unless the *buyer actually receives part of the goods sold, by way of earnest on his part, or gives part of the price to the vendor*, by way of earnest, to bind the bargain, or in part payment, &c.—1 Salk. 113. Notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for the payment is appointed; the earnest only binds the bargain, and gives the party a right to demand, but a demand without payment of the money is void. After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and if the vendee does not come and take away the goods, the vendor should request him, and then if he fails, the vendor might resell.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods till he tender the price agreed on. If a sale be of goods for such a price, *and a day of payment is limited*, the contract will be good, and the property altered by the sale, though the money be not paid. At common law, therefore (or since the statute), when a contract is conclusive according to its form, the law may be taken to be as above stated, and as repeated by Bayley, J., in *Simmons v. Swift*: "Generally speaking, when there is a bargain made for the purchase of goods, and nothing is said, at the time, about the delivery or the time of payment, the property in them vests immediately, so as to subject the buyer to all further risks, provided nothing remains to be done on the part of the seller, although the vendee will not be entitled to take away the goods without payment of the price." Of course a contract sufficient under the Statute of Frauds is contemplated.—Hob. 41; 13 Ea. 522; 12 Ea. 614; 11 Ea. 210; 7 Taunt. 278; 8 D. & R. 702; 5 B. & C. 857; 6 B. & C. 360; 9 D. & R. 276, 295; 8 B. & C. 282; 2 M. & R. 292; 1 Moore, 29; 2 Camp. 344, 240; 4 Camp. 237; 1 Camp. 452; 6 Ea. 614; 2 M. & S. 357; 1 Mar. 258 (n); 5 Taunt. 622.

We are next to consider the effect of the statute, on which subject I would refer to Roberts on Frauds, 178. He suggests the argument of a personal selection of an article being an acceptance, and the subsequent transmission by a carrier an actual receipt, so that combined the statute might be regarded as virtually complied with. But it is obvious that he lost sight of a principle he had before laid down, namely, that by a bare selection no bargain was made. The statute gave no new efficacy to payment of earnest, but it rendered nugatory many bargains valid before; as all parol agreements, where day of payment was fixed, or in which the property would be held changed though no earnest given, by requiring in all cases earnest, or some equivalent act therein prescribed, one of which is expressed in 2 Bl. Com., where it is said that no contract for the sale of goods, exceeding 10*l.*, shall be good unless the buyer *actually*

receive part of the goods sold by way of earnest on his part, or gives part of the price by way of earnest on his part, or in part payment; that is, earnest must now be given or received, though a day of payment is fixed, or though, without it, the contract would have been binding at common law. And the property is not changed, if ready for delivery at the time, unless there be a note in writing, &c. By a *regular* sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for 10*l.*, and B. pays him earnest, or signs a note of the bargain, and afterwards, before delivery of the horse or payment of the money, the horse dies in the vendor's custody, still he is entitled to the money, because by the contract the property was in the vendee.—3 B. & C. 234. And again: When a ready money bargain was verbally made for a horse on a Sunday, afterwards delivered and paid for on Tuesday, the Court held there was no complete contract on the Sunday, that all lay in parol; nothing was given to bind the bargain, and consequently it was not a contract made on that day. The delivery on Tuesday would not make a contract on Sunday by relation, but of the day of delivery and payment. It would be a delivery according to terms agreed upon on Sunday, but nothing more. All that then occurred related to the terms on which the sale was to take place. The contract was not valid till the horse was delivered to and accepted by defendant.

In the present case, no terms of payment were adjusted; but if they had been, the contract was not good for want of earnest given or received, or a note in writing. Consequently no change of property took place, it remained in the plaintiff, might have been seized in execution as his, he might have sold to another, &c. Under such circumstances, the delivery to a carrier afterwards could not entitle the plaintiff to sue, unless the defendant accepted. Though formerly held otherwise, it is now settled that goods not selected by the buyer, but delivered to a carrier and consigned to the vendee, upon a verbal order, are not an acceptance or receipt within the statute.—3 Cam. 528; 3 B. & A. 321; 5 B. & A. 559; 2 B. & C. 40; 4 M. & S. 262; 2 Mar.

457. The cases establish, I think, that there must be an actual acceptance and receipt of the whole or part; an acceptance posterior to or concurrent with the delivery. A *receipt as owner*, or an *acceptance* within the statute, seem convertible terms. In other words, if earnest is not given by the buyer, it must be given by the seller and received by the buyer; and if so, a personal selection will have no legal effect, unless afterwards confirmed by acceptance. It is manifest the long list of cases on the subject did not mean to allude to an actual receipt, when they speak of an actual acceptance, unless they considered them of like import, as I think at present they do. It is necessary to preserve distinctly in the mind the distinction between contracts binding, as having been executed conformably to the statute, and cases in which the validity of the bargain is disputed, by reason of non-compliance with its provisions. When it will be seen that all inchoate contracts, not bound by earnest given or received, or writing, are invalid and not susceptible of being confirmed by one party, without the assent of the other; from which it follows that, after a parol purchase, no earnest being given or received, a delivery to a carrier, though a good execution or delivery on the vendor's part, is no acceptance or actual receipt by the vendee. Certainly no acceptance by the vendee. Neither was there any previous acceptance, which could not be without delivery; in other words, without a receiving of earnest, to which an actual delivery is indispensable.—⁷Taunt. 587. This is the doctrine which it appears to me is inculcated by the following cases—a doctrine recognized by various late text writers, when treating upon the 17th section of the act.—7 T. R. 64; 3 B. & P. 233; 1 Camp. 233; 2 C. & P. 532; 3 Cam. 528; 3 B. & C. 321; 3 B. & A. 683; 5 B. & A. 557; 2 B. & C. 41; 3 B. & C. 234; 2 B. & C. 513; 3 D. & R. 827; 8 D. & R. 343; 1 Ea. 192; 1 Moore. 328; 5 B. & A. 855; 1 D. & R. 515; 3 B. & C. 1; 4 D. & R. 619; 1 C. & P. 272; 2 C. & P. 534; 4 M. & R. 470; 5 Price, 630.

From all which I infer, that the late cases decide, that there cannot be an acceptance within the meaning of the

statute, so long as the vendor continues to hold the possession and control of the goods to be accepted. There are cases in which it has been left to the jury to say, whether goods were accepted or not.—1 Moore, 328 ; 2 B. & C. 511 ; 3 D. & R. 822. As when, at an auction, a party kept an article a few minutes, and then returned it, a lien subsisting all the time in the vendor ; but it was considered, that it formed a fact, as much whether the vendor had delivered, as whether the vendee had accepted. Again, where a stack of hay was sold, and defendant had exercised acts of ownership, they were held evidence of an acceptance.—1 Ea. 192. But I have met with no case in which it has become a question, whether upon a consignee's rejecting goods on their arrival, which were selected by himself personally, the vendor could sustain assumpsit for goods sold and delivered, if the Statute of Frauds be urged ; and it seems to me, that in this case the vendor could not sustain a suit for non-acceptance, or for goods bargained and sold, if defendant refused to receive them—the former admitting and the latter assisting, or being founded upon a change of property. The vendee could not recover for non-delivery, if the vendor declined parting with them, upon tender of the price. The vendor could not, by any act of his against the will of the vendee, obviate the exigencies of the statute ; but if a delivery to a common carrier can be regarded as an actual receipt by defendant, within the statute, as well might it be said, that placing it in the power of the vendee to take things, was a delivery.—2 B. & A. 755. If so, the plaintiff, by an act of his against defendant's will, could supersede the act, and defendant by no act of his could attain the same advantage. It seems to me, that if the carrier can receive for the defendant, within the meaning of the statute, the same party may also accept ; or the same delivery may constitute an acceptance and receipt ; and if the statute is complied with, I should rather conceive it would be by reason of the delivery to a carrier pursuant to defendant's order, as both an acceptance and receipt, than as a receipt referring by relation to a previous acceptance by the defendant personally. The evidence is, that the defendant, at

Montreal selected a set from a pattern dish shewn him, on which he directed his arms to be engraved, and then to be transmitted to Upper Canada, to which plaintiff agreed. It is like a person buying a coach, and directing his arms to be painted on the panels, and then sent home, being silent as to payment. Would the property vest in the vendee, so as to be at his risk while painting? Were the dishes at the defendant's risk while engraving? Could the coachmaker in the case supposed, or the plaintiff in this, have sold the articles to any other person? Would the right of lien be waived, by agreeing to the proposition to have the arms engraved or painted, and then to forward the things? or was the property vested in the defendant, subject to the plaintiff's right of possession as a lien? If the property vested, the plaintiff could have sued for goods bargained and sold; if not vested, he could only recover in a special action for not accepting. Could the former be sustained upon tender and refusal of the articles? I think the property would not vest, because no valid bargain in law was concluded. The terms only were adjusted; no legal bargain was made, binding on the parties. The property in this case remained in the vendor, and would not vest in the vendee without a subsequent acceptance of the whole or a part, in the absence of earnest paid, or a written note or memorandum of the bargain. The property would not vest in the defendant at Montreal, unless by reason of the defendant's direction for forwarding the same, when engraved, shewing that an immediate payment and delivery were not contemplated, by reason of the delivery and payment being appointed at a future period, when engraved; for there was no relinquishment of the plaintiff's lien, or promise to deliver them, unless paid for. There was not in truth a contract binding on either party. No acceptance—no actual receipt of any part—no earnest given—no part paid—no written memorandum. It is a very important general question.

Such are my present views on the subject, which I freely express, reserving of course the privilege of changing them upon further consideration, or subsequent authorities

when a case shall arise, rendering it incumbent upon me to pronounce a fixed judicial opinion upon the subject.

Per Cur.—Rule discharged.

MACAULAY, J., *dissentiente*, on the Statute of Frauds.

RUGGLES v. BEIKIE.

The heir-at-law is entitled to recover from a sheriff, the surplus of moneys arising from a sale of his ancestor's lands, on a fieri facias against those lands, in the hands of his executor.

In an action against a sheriff for the overplus of money levied under an execution, the plaintiff must prove a demand of the money before action brought.

Debt against the late sheriff of the Home district, by the plaintiff, an heir-at-law of J. R., deceased. The declaration stated a judgment recovered against J. R., the father, for the sum of 103*l.* 4*s.* 9*d.*, after which he died intestate. That the judgment was revived by *sci. fa.* against his administratrix ; and thereupon the *fi. fa.* was issued against the lands, which were of the said James Ruggles, at the time of his death, which *fi. fa.* was endorsed to levy 22*l.* 9*s.* 1*d.* That on the 1st March, 1811, the lands of J. R., which descended to the plaintiff, who is heir-at-law, were sold by the sheriff for 17*l.*; and that a balance, amounting to 14*l.*, remained in the hands of the defendant, whereby an action hath accrued, &c. The declaration also contained the common money counts in debt. The defendant pleaded *nil debit* and the Statute of Limitations. The plaintiff took issue on the first plea and demurred to the last, which was pleaded to the first and special count of the declaration.

Draper argued for the plaintiff, in support of the demurrer, and the *Attorney-General* for the defendant, who took an exception (among several others, which were not adverted to by the court), that no demand was averred in the first count of the declaration. The cause stood over till to-day.

ROBINSON, C. J., confined his judgment to the consideration of the demand, and expressed his opinion against the declaration on that point only, considering it necessary, at least in an action by any other than the defendant in the original action, that a demand should be made of the sheriff

and that he could not be supposed to know, nor was he bound to seek out, the party entitled to the surplus.

SHERWOOD, J., differed. (After stating the case.) I am not aware that any cases between parties like the present can be found in this province, and the English common law reports furnish none, because real estates of inheritance are never sold in England, for the satisfaction of debts, upon process from a court of law. There are authorities, however, which I consider analogous in principle. The case reported in 1 Mod. 245, was an action on the case against a sheriff, "for that he levied a sum of money on a *fi. fa.* at the suit of the plaintiff, and did not bring the money into court at the return of the writ." The defendant pleaded the Statute of Limitations, and the plaintiff demurred. The court gave judgment for the plaintiff, remarking that "if the *fi. fa.* had been returned then the action would have been grounded upon the record, and it is the sheriff's fault the writ was not returned; but, however, the judgment in this court is the foundation of the action." There is also a case in 2 Mod. 212: An action of debt was brought to recover the amount of a sum of money levied by a sheriff on a *fi. fa.* which had been returned before action brought. The defendant pleaded the Statute of Limitations, and the plaintiff also demurred. Three judges out of four held that the case was not within the statute, because the action was brought against an officer who acted by virtue of an execution, in which case the law created no contract, and therefore the statute did not apply. These cases are cited as approved authorities in Bac. Abr. title Limitation of Actions. There is also another case reported in 1 Lev. 273, and in 2 Saund. 64, containing the same doctrine. It was an action of debt on award, to which the defendant pleaded the Statute of Limitations in bar, and the court decided, on demurrer, that an award was not within the statute. Because, although it was not founded on a specialty, still it did not come within the words of the statute, which extended only to actions of debt grounded on any lending or contract, without specialty;" and therefore actions of debt, without specialty generally, are not limited, but only

such actions as are grounded on some lending or contract, in fact, but not by implication of law. I cannot distinguish the principle of these cases from the one before the court, as it is not grounded on any contract or lending in fact, but upon the judgment which authorised the issuing of the *fi. fa.* on which the defendant levied the money as a public officer, and I am therefore of opinion the present case is not within the statute.

It is also necessary to inquire if the plaintiff has a legal claim to the surplus money, and a right to institute the present suit for its recovery from the defendant, who was the sheriff by whom the execution against the lands was executed. By the common law of England, which we have here, except so far as any statute in force has changed it, the administrator has no claim to the real estate in fee, and consequently cannot effect a valid sale of it himself. How then can he have a legal right to the proceeds of a sale of it made by another? By the common law, he clearly has none. Does the statute, 5 Geo. II., ch. 7, give him that right? That statute in substance enacts, that lands in that plantations shall be liable to and chargeable with all just debts, and shall be assets for the satisfaction thereof, in like manner as real estates are liable to the satisfaction of debts due by bond in England, and shall be subject to the like remedies towards the satisfaction of such debts, and in like manner as personal estates. Now I discover nothing in this enactment which impliedly vests the property of real estate in the administrator, because the lands may be liable to and chargeable with all just debts in the hands of the heir or devisee, as conveniently as they could be in the hands of the personal representatives, and indeed they uniformly have been so, ever since the statute came into operation in this province. At the death of the ancestor intestate, the lands descend to the heir, and he then becomes the owner of them by the same right which the ancestor had when living, subject to the satisfaction of all just debts; and if a surplus remains upon a sale of any of them, by virtue of an execution for payments of debts, he is the legal owner, in my opinion, of such surplus, because it proceeds

immediately from the lands. An administrator derives his whole authority and his right to the possession of the goods of the intestate, from the letters of administration alone ; and pursuant to our provincial laws, which have adopted the provisions of the 22 & 23 Car. II. c. 10, he is obliged to enter into a bond, with two or more sureties, conditioned for the making or causing to be made a true and perfect inventory of all the goods, chattels and credits of the deceased, and for well and truly administering the same according to law. Now it is evident, the surplus money in this case does not come within the description of the goods, chattels and credits of the intestate, any more than the rent of the premises which happened to accrue at the time the land was sold by the sheriff, which was seven years after the death of the intestate. The stat. 5. Geo. II. undoubtedly rendered the lands liable to be sold in the hands of the heir, under a process of execution issued upon a judgment recovered against the administratrix ; but such proceedings under the authority of the statute, could not have the effect of either changing the nature of the property in the lands, or of the proceeds of the sale ; the heir owned the lands till they were sold by the sheriff, and then so much of the proceeds of the sale as would satisfy the balance of the judgment belonged to the creditor, and the remainder of course to the heir-at-law, as much as the surplus on the sale of the goods by the sheriff would belong to the administrator. The statute makes the land liable to be sold in the hands of the heir, for the satisfaction of all just debts, but it is silent in regard to any surplus money arising from any such sale, but I think such surplus comes within the equity of the statute, and would be equitable assets in the hands of the heir, subject to the interposition of a court of equity in favour of a *bona fide* creditor.

It is unnecessary, however, to pursue this part of the subject any further, as there is no intimation of any existing debt at this time. More than twenty-eight years have elapsed since the judgment was entered, and this period of time is sufficient to raise a presumption of payment of all simple contract or even specialty debts, had there even been

any. Lands, in my opinion, are assets by descent, in the hands of the heir or devisee, for the satisfaction of all just debts, and may be sold under the same judgment which is recovered against the personal representative for the purpose of selling the goods, and this proceeding for a two-fold purpose is authorised by the statute 5 Geo. II. before mentioned. This is my view of the principles which appear to me to govern the present case; and notwithstanding they deviate from the rules of the common law in some respects, still I think the anomaly is created and sustained by the statute so often referred to in these remarks.

The last point which calls for enquiry is, whether the plaintiff was not bound by law to make a special demand of the money, before he brought this suit. In my opinion, the plaintiff had an election to bring debt or assumpsit, and that the same evidence is necessary to support both actions. When one man receives money belonging to another, the bringing of an action for its recovery is a sufficient demand at common law. If the sheriff levies money under a *fi. fa.*, the plaintiff in the suit may bring an action of assumpsit for money had and received, without any previous demand.—3 Salk. 323; 1 Esp. 263; 3 Camp. 347; 3 B. & A. 696; 1 B & B. 370. These cases are decided upon the broad principle, that money had and received by any person is money had and received to the sole use of the party legally entitled to it, whoever he may be, and that he can sustain an action without any other demand. Now, I have been able to discover no good reason why a previous demand in this case should be required by law, any more than it is in an action by a plaintiff to recover the money levied by the sheriff for him. There is no legal privity between the sheriff and a party to a suit. It certainly may be said the sheriff does not know the heir, but this reason was urged by the counsel as respects the plaintiff, in a suit decided in England.—3 Camp. 347. It was then said, "If sheriffs were liable to be harassed with such actions, they might be ruined in performing the duty of their office. How could they tell where the plaintiff was to be found? He might be in a distant part of the world." Lord Ellenborough said:

"Sitting here, I can only consider whether the action in point of law is maintainable, and I make no doubt that it is. Upon the sheriff's return, the money was money had and received by him to the plaintiff's use; and as it never had been tendered to him, he had strictly a right to recover it without any previous demand of payment." In my opinion, the sheriff is as likely to know the heir, and is as able to find him as he would be to find the plaintiff himself, at whose suit he sells the land of the heir; both of them may reside in a foreign country, and the sheriff may be equally a stranger to both. If this last reason is inapplicable when a plaintiff sues for money received on a *f. fa.*, I think it as much so when a party sues for money received for his use in any other way. There is another consideration which induces me to conclude the sheriff, in this case, was not entitled to a previous demand of the money. The debt and expenses to be levied were only 22*l.* 6*s.* 1*d.*; but he seized and sold lands to the value of 171*l.* This was more than six times the amount of the debt, costs and incidental charges; and it appears to me there was *prima facie* evidence at least of an excessive levy. Under such circumstances, I think the plaintiff might have brought an action upon the case against the sheriff for an excessive levy; and if he had done so, no previous demand would have been necessary before bringing such an action.—*I Bing.* 369. The plaintiff, however, has waived the apparent tort, and put the defendant in a better situation, by bringing an action for money had and received, because no damages beyond the actual amount of the money can be assessed in this action; but in the other form of action for an excessive levy, the amount of damages would be in the legal discretion of the jury, and must depend on the facts and circumstances adduced in evidence. In my opinion, the plaintiff ought not to be in a worse situation by waiving the tort and bringing this action, than he was before.

Upon as full a consideration as I have been able to bestow on the case, I think judgment should be given for the plaintiff.

MACAULAY, J.—If lands as assets, under 5 Geo. II. c. 7,

cannot be strictly regarded as real or personal, but if the estate is to be considered as descending to the heir-at-law, or vesting in the devisee, subject to be defeated by a sheriff's sale at the suit of a creditor, obtaining judgment against the executor or administrator—if they are not assets real, in the hands of the heir, or personal, in the hands of the executor, but real estate which descends, and assets of the deceased of a special character, subject to be disposed of as such (not by the executor or administrator) by judicial process, as upon a power or authority imparted by the statute to all courts of law and equity, to sell the same in like manner as they could dispose of the personal estate—then it would seem to follow, that upon a judgment obtained against an executor or administrator, ascertaining a debt of record, a power of sale results under it, to be exercised by a *fl. fa.* as would be used against goods. The judgment would ascertain the debt, and the statute would authorise the sale; the writ being founded on a suggestion, and being awarded on the prayer of the creditor, under the stat. 5 Geo. II. Thus regarded, the amount essential to realise the debt, would be alone assets: any surplus would belong to the owner of the property sold. The executor or administrator would have no interest therein, being merely the medium through which the authority would be exercised. The sheriff then would hold the surplus for the use of the owner, and it would be his duty to pay it over to him on demand. For such surplus, an action of debt would lie, at the suit of the heir, devisee, or other owner of the lands sold, grounded upon two principles: first, as for money had and received, money which *ex aequo et bono* the sheriff ought to pay over, and for which the party may sue as *ex quasi contractu*; and 2nd, upon the duty of the officer to pay the person entitled thereto.—1 Burr. 1012. But to entitle a collateral party, a stranger to the record, to sue, a previous demand should be made, upon the principle and authority of the cases, and be averred in the declaration.—Noy, 59; 2 B. & C. 682; 4 D. & R. 181; 4 T. R. 553; 1 Saund. 32; 5 T. R. 409. The Statute of Limitations would not begin to run until such request was made; but from a demand

and refusal it would apply, for from that time the cause of action would be complete ; and though partially grounded on the duty, it would equally be grounded on the contract.—*i* Taunt. 572 ; *3 B. & A.* 696 ; *i Sellon.* 530 ; *Bing.* 268. Upon demand, an implied contract would result, entitling the owner to sue for money had and received, averring a special request ; and against such a demand, the statute would, I think, run. The present declaration is bad on general demurrer, as not containing any averment of a demand before action brought.

Per Cur.—Judgment for defendant on demurrer.

SHERWOOD, J., *dissentiente.*

Small immediately applied for and obtained leave to amend the declaration, by inserting an averment of a demand and refusal, on payment of costs.

REGULÆ GENERALES.

1. *It is ordered,* That in future when bail which has been put in, in the country, is to be justified in court, the bail-piece, with the affidavit of the due taking thereof, and the affidavit of justification, shall be taken from the office of the deputy clerk of the crown of the district in which they have been filed, and shall be produced in court upon the motion for allowance, and afterwards filed in the office of the clerk of the crown and pleas, at York.

And that the deputy clerk of the crown shall, on notice given to him for that purpose on behalf of the party moving for the allowance, transmit the same to the principal office, in order that this rule may be complied with.

2. When the defendant is described in the process or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be uncalled, on motion for that purpose, if it shall appear to

the court that due diligence has been used to obtain knowledge of the proper name.

3. *It is ordered*, That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest or copy and service, exclusive of mileage and attendance to receive debt and costs ; and that upon payment thereof within four days, to the plaintiff's attorney, or to the plaintiff when the writ shall have been sued out by the plaintiff in person, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed ; and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The indorsement shall be written or printed in the following form :

The plaintiff claims £ _____ for debt, and _____ for costs, exclusive of mileage ; and if the amount thereof, with the charge for mileage, be paid to the plaintiff's attorney (or to the plaintiff, if he sues in person), within four days from the service hereof, further proceedings will be stayed.

4. *It is ordered*, That every affidavit of debt shall contain the christian name or christian names and surname of the defendant, written at length, with his place of abode, and additions.

5. *It is ordered*, That the expense of a witness, called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission. This rule not to take effect until Michaelmas term next.

6. *It is ordered*, That the expense of a witness, called only to prove the handwriting to or the execution of any written instrument stated upon the pleadings, shall not be allowed unless the adverse party shall, upon summons

before a judge a reasonable time before the trial (such summons stating therein the name, description and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before him, shall indorse upon such summons that he does not think it reasonable to require such admission. This rule not to take effect until Michaelmas term next.

7. A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

8. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.

9. It shall not be necessary to the regular service of a rule that the original should be shewn, unless sight thereof be demanded, except in cases of attachment.

10. *It is ordered,* That judgment may hereafter be signed after a verdict or assessment of damages, without any rule for judgment, but not before the time when judgment may be signed, according to the present practice of the court.

During this term, Robert Sympson Jameson, Esquire, was appointed Attorney-General of this province, *vice* H. J. Boulton, Esquire, since appointed Chief Justice of Newfoundland. Mr. Jameson was also called to the bar of this province, and took the oaths, before taking his place in court. George S. Tiffany, and John Ogilvie Hatt, Esquires, were also called to the bar.

(Signed) J. B. ROBINSON, C. J.
 L. P. SHERWOOD, J.
 J. B. MACAULAY, J.

KING'S BENCH,

MICHAELMAS TERM, 4 WILL. IV.

GATES ET AL. V. CROOKS.

Quære: If a sheriff is entitled to poundage on a *fi. fa.* against lands—where he advertises the lands, but before a sale the parties compromise.

In this case a writ of *fi. fa.* had issued against lands and tenements, to levy a debt of 9,000*l.* and upwards, which was delivered to the sheriff of Niagara. The debt was afterwards arranged between the parties, and no sale ever took place under the execution, nor did any money pass through the sheriff's hands. The sheriff advanced a claim to poundage, which would in this case amount to 100*l.* and upwards; and upon an affidavit stating the facts, the opinion of the court was desired upon the sheriff's claim. It was stated that he had *levied* upon lands sufficient in his district to cover the debt, and had advertised them for sale according to law, so that nothing remained to be done but to sell, from which he was restrained by the compromise between the parties.

The court, in this term, remarking that this question was not before them upon any motion, or upon any judicial proceeding, declined expressing an opinion; and it was intimated that they would not at all events decide it upon a summary application—that the claim advanced amounted to a considerable sum, and was rested upon legal grounds rather than equitable considerations, and they thought the sheriff should be left to his legal remedy by action, when the motion could be formally adjudged, with the benefit of appeal, if it should be thought desirable, by either party. The cases in 5 T. R. 470, 4 M. & S. 256, were referred to, and several cases in Anstruther's Reports, where the Court of Exchequer made orders respecting the appointment of poundage upon extents, which proceeded, however, upon the statute of Geo. I. regulating poundage upon debts levied for the crown.

MCNAB V. MCFARLANE.

Agreement by which plaintiff agreed to convey defendant to this province and to assign him 100 acres of land in the township of M., and to give or procure him a title thereto in fee, as soon, &c. Defendant agreed that the allotment to be made should be subject to the payment of one bushel of wheat yearly, for every acre cleared, for ever, to commence at the end of three years, if the defendant should have been placed on his land, with a proviso to extinguish such rent charge. *Held*, that the plaintiff could maintain covenant for this rent charge, the defendant having been placed on his allotment for three years, although no patent for the land had issued, or any deed of it made, creating such rent charge.

Covenant for rent, upon an agreement between plaintiff and defendant, by which, after reciting that the plaintiff had leave to settle the township of McNab, upon certain terms, the plaintiff agreed to convey the defendant to this province, and to assign him one hundred acres of land, upon his arrival at the township of McNab, and to give or procure him a title thereto in fee, so soon as he should have performed the required duties of settlement appointed to be done by all grantees of the crown, the defendant defraying the charge of the patent. The defendant, on his part, agreed to owe the plaintiff 35*l.*, and that the allotment of land, to be made to him by the plaintiff or his Majesty's government upon his application, should be made subject to the payment of one bushel of wheat yearly for each acre of cleared land, to plaintiff, forever. Such payment of rent-charge to commence at the end of three years, if the defendant should have been *actually placed* upon his lands; with a proviso, that if defendant should, within seven years from the time of his actual location, pay plaintiff the said sum of 35*l.*, with interest at five per cent., for the three years during which he held the said land free of the said rent-charge, then that the same should be thenceforth exonerated and discharged from such rent-charge.

At the trial a verdict was rendered for the plaintiff, and the following points were reserved: 1st, that no evidence in writing had been produced, whereby any particular piece of land has been assigned to the defendant, either by the government or the plaintiff; 2nd, that no action can be maintained for the rent, until a patent hath issued to the defendant, reserving the rent of one bushel of wheat per

acre of cleared land ; 3rd, that the particular lot named in the pleadings, has not been proved to have been so assigned.

The case was argued by *Spragge*, for the plaintiff, and the *Attorney-General*, for the defendant.

ROBINSON, C. J.—I am of opinion, that the plaintiff's case is not defeated by any of the objections raised at the trial, and reserved for our consideration. Upon the first point, the plain sense of the agreement is, that the defendant was to be placed upon a lot of land with his family, and this, it is averred and proved, was done. There was no stipulation expressed that any written assurance of a title was to precede the deed, nor do I think there was any such stipulation to be implied from the nature of the transactions, but the contrary. The plaintiff, for all that appears, could have no interest to assign, until the defendant, by complying with the regulations of the government, should entitle himself to a grant ; and then the plaintiff covenants he will procure him a grant, or make him one, according (it is to be supposed) as the government might choose to grant the whole to the plaintiff in a body, subject to his distribution, or to make a separate grant to each of the plaintiff's settlers, who might show himself entitled by his agreement with the plaintiff.

The second objection is, I think, unsupported by the terms of the covenant. The plaintiff entitles himself to this action, by showing that he does all he had to do to fulfil his part of the contract, by bringing out the defendant and his family, allotting him 100 acres of land, and placing him upon the land. From the time he shall be placed on the land, the covenant says he is to enjoy it three years rent free, and then the rent of one bushel of wheat per acre of cleared land is to commence ; at least, so I read the agreement. The plaintiff shows that the defendant has been three years on the land, has several acres cleared, and yet, for the two years which have elapsed since the three years expired, he has delivered him no wheat. Why should he not ? Those are the terms of the agreement, according to my construction of it. I see no reason why *placing on* the

land should mean one thing in one part of the agreement, and another thing in another part. We are asked, however, to depart from the plain words of the agreement, and to infer that no rent was to commence until a patent issued or a deed was made to the defendant. The terms "allotting 100 acres of land," or "placing him on the land," do not in common experience receive such a construction; and as to what is said of a rent-charge, to be contained in the deed or grant when it does issue, that I look upon as a stipulation for a higher security to the plaintiff than the mere agreement, which security is to be given as soon as circumstances will permit. To say that because he is to have his rent secured *in the deed*, whenever it may issue, he is to have no rent or no remedy for his rent till it *does* issue, does not seem to me to be consistent with reason, and the agreement therefore should not receive that construction, unless it is inevitable from the language; but I think the language warrants and requires a construction more in accordance with justice and the nature of the transaction, for it says, such "payment" or rent-charge to commence, &c.; that is, "*payment*," in case no title has been given—after that, a *rent-charge*.

As to the third exception, no particular lot is alleged other than under a *scilicet*; none need have been averred specifically, and the words, "said land allotted to him," fairly apply to the hundred acres, whichever they may be. They are merely words accessory to whatever is substantial in that allegation. If, upon the reasonable construction of the words used in this agreement under the seals of the parties, an undertaking is implied on the part of the defendant to pay this rent in kind, after he has been three years in possession, then it is plain that covenant lies, though there be no express words of promise or covenant used.—*Bac. Abr.*, Covenant A.

It does not seem to me that there is any room for doubt, except as to the main point made in the argument, namely, what is the true construction of the agreement in respect to the time from which the defendant undertakes to make his payment or delivery of wheat—whether that undertaking is

absolute, to deliver the bushel for each acre cleared, after he has been three years on the land (whether he has received a title or not), or whether no payment or delivery of wheat can be compelled until a rent-charge has been actually constituted, by a delivery of a title to defendant, in which a rent-charge is provided for. Upon that point, I have always thought it clear, that the plain understanding of the agreement was as I have stated. We know that in construing agreements between party and party, we must consider their true meaning, and give it effect ; that is, we must give to the words used, that construction, where there is room for doubt, which will be most consistent with the intention of the parties, as apparent in the whole instrument, referring also to the nature of the transaction which gave rise to the contract ; and this true meaning is not to be defeated by narrowing the sense of a particular word to its proper technical import among professional men, when the giving to that word its more vulgar and popular sense, will better accord with the evident intention of the parties.

Thus it is true that *rent* implies the legal relation of landlord and tenant, and *rent-charge* implies a reservation made by a person parting with the fee ; but either expression may be so used in an agreement as to shew that the persons had really something in contemplation, which would have been better expressed by another name. However, I think no difficulty is created here by the parties using the word *rent-charge* ; because, in the same sentence, the word *payment* is also used, and that is comprehensive enough to carry into effect what they meant. "Such *payment or rent charge* is to be made," &c. In short, I view it thus. If the parties did really agree that, after three years had expired from the defendant's going on his land, he should pay to plaintiff so much a year for every acre he had cleared, whether he had received a patent or title, or not, and that when a title should be given him, it should contain a clause creating a rent-charge—clearly the parties might express that agreement in words that would leave no doubt, and such agreement must be binding ; neither would it be otherwise than a most reasonable agreement, for rent usually is

concurrent with occupation, and the postponing of it for three years is so far an indulgence. It is true that the defendant might be injured and perhaps ruined by the plaintiff's failing to procure him a title, after he had done all to be done on his part ; but against such a failure he has provided, by taking an explicit clear covenant from the plaintiff, that he will give or procure him a title, and it is not for us to say that that remedy may possibly prove insufficient. I think, looking at this agreement from the beginning to the end, the case between the parties stands thus : If the defendant has been brought out at the plaintiff's expense, has had land assigned him, lived on it, and reaped from it, he has received an advantage for which in reason he ought to pay. He has, I think, stipulated to pay from the end of three years, according to the true construction of his agreement, and being sued, if he should say he has not received a title, the plaintiff may fairly say that may be your fault or mine. If mine, you can clearly sue me on the agreement. If the fault is yours, there is no reason or justice in your making that a pretence for not delivering me the wheat. If a patent had issued or a deed been given to defendant, it might, according to the agreement, have contained a rent-charge, and then the plaintiff could have distrained. Until that is the case, he cannot have that advantage ; but still the defendant has his allotment of land, and is bound, as I read the agreement for that allotment, to make a pay in wheat annually, from a day now past, and he has not done it. Hence arises the plaintiff's action, and I can see nothing in the agreement to bar or discharge it. I am therefore of opinion for the plaintiff.

SHERWOOD, J., agreed in opinion with the Chief Justice.

MACAULAY, J.—I am of opinion, the present action does not lie, under the second objection. It appears to me, the covenant in relation to a rent-charge was prospective, the defendant merely agreeing that the allotment of land to be allotted to him should be made, subject to the payment or rent-charge, or to the payment of the rent-charge specified. The defendant bound himself to accept a location and title accompanied with such a reservation to attach upon the

estate, and run with it, as a lien for ever, unless redeemed or extinguished, as provided for. I do not think the language used imports it, or that the defendant meant to covenant to pay such rent-charge at all events, without regard to title, as a personal obligation assumed in contemplation of a future location and grant, or other conveyance, of a lot of land, not then selected or specified. I conceive it was designed that the rent should be charged upon the estate; that, in other words, the parties meant, not a present personal covenant to make a payment, ascertained in point of amount, by a specified principle, but a rent-charge, properly and technically so called, to be imposed upon and accompany the land which the defendant expected to receive under the agreement, so incumbered in perpetuity (unless relieved on the terms declared and mentioned), into whosoever hands it might go from the defendant by descent, purchase or otherwise. The rent-charge can only be created by the instrument of location, government grant, or deed to the defendant; and his personal liability can only attach by reason of the terms of such title; and as no such conveyance or title is shewn, there is nothing to sustain the responsibility with which the defendant is sought to be burdened. It cannot, I think, be collected by construction from the original agreement, or the facts disclosed upon the record.

Per Cur.—Postea to the plaintiff.

MACAULAY, J., dissentiente.

HUYCK v. McDONALD.

Where a purchaser re-conveys the same lands to his vendor, by mortgage in fee, to secure payment of the purchase money, he cannot sustain an action against the vendor for breach of covenant for good title, while the mortgage continues in force.

Covenant. The declaration stated, that by indenture, dated 1st February, 1827, the defendant bargained and sold, &c., to plaintiff, and to his heirs and assigns, a parcel of land in the township of Thurlow, viz., the broken fronts of 17 and 18, in the 1st concession; and that in the said

indenture defendant covenanted with plaintiff that he the defendant then was the true owner, &c., and was lawfully seised, &c., of the premises in fee, in his own right.

Breach, that defendant was not, at the time of making of the said indenture, the lawful and rightful owner of the premises in the indenture mentioned, and was not then lawfully and actually seized in his own right of the premises, &c., but on the contrary, he had not then any lawful right or title to the premises, or any part thereof.

Pleas: 1st. *Non est factum.*

2nd. That he was seised in fee, &c., when he conveyed to plaintiff.

3rd. That after the making of the indenture, and before the bringing of this action, viz., on the same 1st February, 1827, plaintiff, by another indenture, granted, bargained and sold, &c., these same premises to defendant in fee.

4th. That plaintiff has assigned to defendant, as in last plea, with a proviso in the assignment, that if plaintiff should pay to defendant certain sums, on days specified, the indenture of assignment should be void; and that if plaintiff did not pay, defendant might enter and possess the premises. Avers that plaintiff did not pay those sums, by reason whereof defendant hath full right to enter and the premises to possess.

5th. That before the indenture in the declaration mentioned was made, it was agreed between plaintiff and defendant, that, to secure the payment of 70*l.*, being the consideration mentioned in the indenture for the purchase of the premises, plaintiff should re-convey to defendant, with proviso for redemption on payment of the 70*l.*, at certain days, &c., in pursuance of which agreement an indenture was made, as mentioned in 4th plea, with proviso as there stated; which indenture was duly registered, 7th February, 1827. That plaintiff made default in paying the money, by reason whereof defendant has right to enter and to possess and enjoy the premises.

Issue on the first and second pleas, and general demurrer to the third, fourth and fifth.

The demurrer was argued in Trinity Term, by *Draper*

for the plaintiff, and *Boswell* for the defendant, and stood over for the consideration of the court.

ROBINSON, C. J., delivered the judgment of the court.

The question raised by the demurrer is, whether the plaintiff, after he has assigned the estate to the defendant, can bring this action upon the breach of covenant for the title. We are of opinion that he cannot. This being a covenant that runs with the land, it follows clearly that the plaintiff, having parted with his estate, has parted also with the right of suing upon the covenant for title; and it is sufficient to refer to the case of *Kingdom v. Nottle*, 1 M. & S. 355, 4 M. & S. 57, as establishing this principle by modern decisions in its fullest extent, whether the estate is transferred by act of law or by the act of the party. The case of *King v. Jones*, 5 Taunt. 418, is determined upon the same principle; and it is fully settled that, notwithstanding the covenant for title was taken while the estate was in the hands of the former owner, nevertheless, if he has not recovered damages for the breach while the estate remained in him, the breach is treated as a continuing breach, and, with the covenant, it follows the estate, so that the assignee or heir is entitled to recover, and not the assignor or the personal representatives of the ancestor. It is unnecessary to allude to the qualifications of this rule, which may enable the personal representatives, or the assignor himself, if living, to bring an action, when there has been an actual eviction in his time, or under other special circumstances. Nothing of that kind is alleged here. It is not pretended there has been any eviction, nor are circumstances stated which would entitle the plaintiff to this action, unless in all cases an action can be brought for breach of covenant for title, by an assignor after his assignment.

Now the cases cited clearly establish that if this plaintiff had assigned to a third person, a stranger, he could not, after such assignment, have brought an action upon this covenant for title, laying no eviction or damage to himself, but simply relying, as he does here, upon the breach of covenant; because a recovery in such an action would bar all other remedy on the covenant; and the assignee holding

the estate, and who would be the person substantially injured, would have no remedy against the covenantor.

Then it only remains to consider that the points in difference in this case are, first, that Huyck has not assigned to a stranger, but to the very person from whom he took the estate, and the very person whom he is now suing upon his covenant for title. Secondly, that he has not assigned absolutely, but has only mortgaged the estate in security for the purchase money.

Both of these are peculiarities in this case, which make against the plaintiff's action, but cannot strengthen it. They shew it to have no equity in its favour; for upon the fifth plea, it is admitted that the plaintiff has paid nothing for the estate, and has re-conveyed it to the defendant in security for the purchase money; so that if the title is defective, the defendant has no security, and the parties are just where they were when the covenant was entered into. But we cannot look upon this assignment to the defendant as otherwise than absolute, as the court remark in *Kingdom v. Nottle*, 1 M. & S. 360-1, and in *Webb v. Russell*, 3 T. R. 402; the equity of redemption which rests with the plaintiff can make no difference, and indeed, if the title is bad, it is not to be supposed he would ever redeem. We must at any rate regard McDonald as the present owner of this estate, and the person alone entitled to sue upon this covenant, and therefore we give judgment for him on this demurrer.

Per Cur.—Judgment for defendant.

HAYLE V. HAYLE.

Case for seduction will lie to recover damages, arising from subsequent connexion, though the evidence strongly tends to shew that the defendant had in the first instance committed a rape on the girl.

Case by the plaintiff against his son, for seducing a step-daughter of the plaintiff, living in his family. Upon the trial, at the last assizes for the district of Gore, before the Chief Justice, the young woman gave such evidence as could leave no doubt, if the jury gave credit to her, that the

defendant, upon the occasion of his first criminal intercourse with her, used such violence as made him guilty of the crime of rape ; and supposing that the plaintiff's case rested upon this evidence, the Chief Justice thought it clear that the action could not proceed, since it was indispensable that the defendant should first be brought to answer criminally for the felony. The witness, being further questioned, declared that she was sure the child that had been born was not the fruit of that intercourse, but of her subsequent connexion with the defendant, which had been renewed after an interval of three weeks. The Chief Justice thought that the jury should not be called upon in that action to weigh probabilities in a very nice scale, since it had been so clearly proved that the intercourse commenced by the commission of a felony, for which the defendant ought first to answer ; and he directed the defendant to be taken into custody and prosecuted for the rape, and ordered a nonsuit. The Attorney-General immediately after preferred an indictment, but the grand jury ignored the bill.

Ridout obtained a rule to shew cause why the nonsuit should not be set aside and a new trial had. Which rule was answered by *O'Reilly* for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

I think the nonsuit ought to be set aside and without costs ; for upon reflection I am convinced that I ought to have left it to the jury to say whether the trespass first spoken of by the witness was that which occasioned the loss of service or not ; and I think, upon the evidence, it might have been left to the jury, with a charge strongly in favour of the plaintiff. The principle which renders it impossible, under the policy of our law, to recover damages in a civil action for an injury directly resulting from a felonious act, until the felon has been first prosecuted, is explained in *Cooper v. Witham*, 1 Lev. 247, 12 Ea. 409, and *Crosby v. Long*, 1 Mod. 283. It is not that it lies in the mouth of the defendant to urge as a defence that his own act amounted to felony rather than trespass, but it is incumbent on the court, where the case is clear, to interpose, in order that the ends of public justice may be attained. On the other hand,

it is clear that in this case the “*per quod servitium amisit*” is the gist of the action ; and unless the loss of service clearly sprang from the very act supposed to be felonious, the civil remedy should not be defeated or suspended. Whether it did or not, in this case, ought to have been left to the jury ; and we are of opinion that the non-suit should be set aside without costs.

Per Cur.—Rule absolute without costs.

WILSON V. WILSON.

Action commenced by non-bailable process. Defendant obtained an order for particulars, with stay of proceedings till given. Plaintiff, before delivering particulars, held defendant to bail on an *alias ca. re. Held*, regular.

The plaintiff had commenced his suit by non-bailable process, and the defendant obtained an order for delivery of particulars of the plaintiff's demand, and in the mean time that all proceedings should be stayed. Before their delivery, and pending this order, the plaintiff sued out an *alias ca. re.*, and held the defendant to bail, and an application was made to set aside the arrest on the ground that the stay of proceedings operated to prevent that, as well as any other step in the cause.

ROBINSON, C. J.—We must look at the reason of the thing, in the absence of authority ; and it certainly could not have been intended by the legislature, when they authorised arrest in an action pending, or by the judge or court in making this order for particulars, that the plaintiff should lose the means of securing his debt by the defendant calling for particulars, for in many cases it might result in that. The arrest of the party, while the suit is pending, is supposed to be rendered necessary by the exigency of the moment ; and before a long bill of particulars could be prepared, the defendant could easily remove himself beyond the reach of his creditor. The arrest in this stage is not, in my opinion, a proceeding in the cause within the contemplation of the order. That, I think, is intended to stay further proceeding in the direct line of the suit ; such as declaring, demand of plea, giving notice of trial, &c. The

taking out this capias, I look upon as something collateral, not as a step for carrying on or advancing the cause. I think, therefore, this rule should be discharged.

SHERWOOD, J., agreed, thinking this not a subsequent proceeding, but rather to be viewed in the light of a confirmation of the previous proceeding, and that it is of such a nature as to be impliedly excepted in the order for particulars.

MACAULAY, J., considered the rule as staying all proceedings generally, and that the suing out the *alias* writ, and arresting defendant, was a proceeding in the cause.

Per Cur.—Rule discharged.

GOULD V. BIRMINGHAM.

The court determined that, according to the practice in England, bail must not only be put in, but perfected, before moving to stay proceedings upon the bail bond on the usual terms.

MCKINNON V. JOHNSTON.

Defendant having filed his pleas, plaintiff, on going to pass his record, and not finding them in the office, caused them to be entered on the record, and passed the record without the pleas being in the office, and gave notice of trial, and tried the cause, no defence being made; the court set aside the proceedings for irregularity.

Small moved to set aside the verdict and the *nisi prius* record passed in this cause, on the ground that it was made up and passed without view of the original pleas, which were not in the deputy clerk's possession when record passed, and for variance between the record and the pleas filed. The pleas were filed in the deputy clerk of the crown's office, at Perth, on the 5th of February, 1833. Final judgment (the action being debt on recognizance of bail) was signed, for want of a plea, on the 18th of February. The declaration had been filed about the 1st of November, and defendant's attorney, living at York, moved in Michaelmas Term for time to plead till first of Hilary, and obtained it, and served the rule on plaintiff's attorney,

who was present when it was ordered. The attorneys on both sides being in York, the plaintiff's attorney informed the defendant's attorney that he had heard from his clerk that judgment, for want of a plea, had been signed, in ignorance of the rule for further time, but that he would waive the judgment. Defendant's attorney afterwards searched, and could not find the papers in the deputy's office, and on the first day of term (4th February) he left pleas, which were not filed by the officer till the 5th. Afterwards, in March, defendant's attorney finding that plaintiff had signed final judgment upon the judgment signed in the deputy's office in November, which it was sworn he had agreed to waive, moved to set aside that judgment. This motion was opposed, solely on the ground that no copy of a plea was served, whereas our statute allows judgment for want of a plea to be entered, only in case no plea has been filed, and the judgment was therefore set aside in Easter Term last, as irregular. Just before the last assizes, the plaintiff, going to make up his record, searched at the deputy clerk of the crown's office, at Perth, for the pleas defendant had filed on the 5th of February, but they were not there, as according to the practice they should have been. At the request of the plaintiff's attorney, the clerk applied to the defendant's attorney, who said he knew nothing about them. The plaintiff's attorney stated on affidavit, that the defendant's attorney had sent the pleas to York, where he had the motion made for setting aside the judgment, and finding no plea, he (plaintiff's attorney) caused the pleas to be entered on the record; and filed, served and entered replication, and gave notice of trial. The defendant's attorney, discovering this before the trial, took out a judge's summons to shew cause why the record should not be set aside. The judge declined interfering, but reserved right to move in term without prejudice.

ROBINSON, C. J.—I am of opinion, that however little merit there may be in the objection, we cannot properly avoid giving way to it. We must look upon ourselves here, as in the place of the judge to whom the defendant applied before the plaintiff proceeded to trial, because the verdict

was taken with full notice that the exception would be raised. Under the circumstances stated in the affidavits, I think the defendant ought not to have made the objection; but he has made it, and in my judgment we cannot sanction so great an irregularity as to allow the plaintiff to enter pleas upon the record merely from memory, and get the clerk to certify them, and pass the record, without having the pleas before him which the defendant really did file. It is true, that making his entries from the form of such pleas, the plaintiff has made up the record so as to vary in nothing substantially from the pleas that had been filed, but I cannot think that ought to warrant us in accepting a record so made up and passed as regular. If the pleas had been lost, the natural course would have been to apply to the court for leave to make up the record from a copy. The rule must, I think, be made absolute, but not with costs.

SHERWOOD, J.—I see no injury that has been sustained by the defendant. The record was passed in substance with a plea entered on it similar to that which had been filed, and of which the deputy clerk of the crown had knowledge. He also knew those pleas had been sent to York, and the plaintiff was in no fault that they had not been returned. In my opinion neither strictness, and certainly not equity, require the proceedings should be set aside. If there had been a substantial difference between the pleas filed and those entered on the record or in the issue taken, the case would be altered, but as it is, I think the rule should not be made absolute.

MACAULAY, J., concurred with the Chief Justice.

Per Cur.—Rule absolute without costs.

REX V. FITZGERALD.

The court refused to discharge a prisoner brought up on *habeas corpus*, charged with having murdered his wife in Ireland, communications having been made by the provincial to the home government on the subject, and no answer received, and the prisoner having been in custody less than a year, and bail in such a case will not be allowed, until a year has elapsed from the time of the first imprisonment, although no proceedings have in the mean time been taken by the crown.

In this case, a motion was made for a writ of *habeas corpus* to bring up the prisoner, in order to his being dis-

charged. He was in custody of the Sheriff of Niagara, and it was shewn upon affidavit that he had been imprisoned there since the month of December last, upon a commitment stating that he stood charged upon information on oath, with having murdered his wife, Anastasia Fitzgerald, in the city of Waterford, in Ireland. The court ordered the writ to issue, and desired that the Attorney-General should have notice of the application. A *certiorari* also issued to the justices to certify the informations. Upon the prisoner being brought up, it appeared that he stood charged with the murder of his wife, in Ireland, upon the information of two persons who identified his person, and detailed the particulars of the alleged murder. It was further shewn, that a letter had been found upon the prisoner's person, after he was committed to gaol, addressed to his relations in Ireland, and apparently written by him, the contents of which were such as to leave no room for doubt that the prisoner committed the crime imputed to him. A sworn copy of this letter only was produced, it being alleged by the Attorney-General that the original had been transmitted to the secretary of state, with a communication from the governor of this province, reporting the apprehension of the prisoner, and requesting that proper measures might be taken for procuring his transmission, to be tried for the alleged murder. It appeared that communications had been made by the government of this province, in January and in April last, but that no answers had been yet received. Under these circumstances, the court refused to discharge the prisoner as prayed. It was declared that he was utterly unable to procure bail, but the court signified, that they would not, in such a case as this, admit the prisoner to bail on the ground of delay merely, until a year had elapsed from his apprehension; and that on an application made after that period (if he should remain in custody,) they would do what seemed fit upon the case, as it might then appear to them.

The court expressed their regret at the delay in noticing the communication made by this government to his Majesty's secretary of state, which delay was not accounted

for; but the prisoner's confinement had not yet exceeded the period for which persons are in many cases unavoidably subject to be imprisoned in this province, before trial on charges of felony.

It being intimated, that the prisoner could be more conveniently and securely confined in the gaol of this district, than in the gaol in Niagara, from which he had already once escaped, the court directed him to be brought up the following morning, in order to his being formally remanded, and placed in the custody of the sheriff of the Home District.

RUTTAN V. ASHFORD.

A writ of *ca. re.*, not bailable, must be served by the sheriff or his officer, though the deputy sheriff be a party to the suit.

The writ not bailable, was in this case directed to the sheriff, but served by the coroner without any authority from the sheriff; the plaintiff, being deputy-sheriff, probably conceiving this the more proper way of making the service. Motion to set the service aside.

Boswell, for plaintiff; *Whitehead*, for defendant.

Per Cur.—The provincial statute positively directs that the writ shall be served by the sheriff, or his lawful deputy or bailiff, and we have frequently held, that service of process made in any other manner is irregular. They therefore made the

Rule absolute.

MCDONNELL ET AL. V. LOWRY.

When the defendant (an absconding debtor), on the day a note became due, wrote to the plaintiffs, stating his inability to pay, and requesting further time; the court held this rendered proof of presentment unnecessary, although the notes were payable at a particular place.

Assumpsit against an absconding debtor. Two notes of hand were declared upon, each made payable at a certain day, at the bank of Montreal. The presentment on the day and at the place was averred, but on the trial no proof of presentment was given; and Macaulay, J., who tried the

cause at the last Brockville assizes, reserved it for consideration in *banc*, whether the plaintiff could recover on both or either of the notes. One of them was for 64*l.*, the other for 200*l.*; and with respect to the former, it was proved that the defendant, being at Kingston, wrote to the plaintiffs at Montreal, putting his letter into the post-office (as it appeared from the post mark) on the very day the note fell due, in which letter he asked for further time, declaring his inability to meet the note on the day appointed for payment.

The court held, that this dispensed with the necessity of proving a presentment, and directed the verdict to be entered for the amount of that note; Macaulay, J., doubting whether the plaintiffs could have recovered on the special count, but the declaration contained also the common money counts.

ARMSTRONG V. SCOBELL.

When a motion was made to set aside a writ and the arrest for irregularity, and to discharge him out of custody, or to deliver up the bail-bond to be cancelled, as the case might, the court made it absolute with costs, although more was asked than could be granted.

Rule *nisi* to set aside the *ca. re.* (bailable) and the arrest made under it, and to discharge the defendant from imprisonment; or if he had given bail to the sheriff, that the bail-bond should be delivered up to be cancelled, on the objections following:—1st, that the writ, though sued out in vacation, was tested on a day in the term, not the last day of the term; 2ndly, that there was no endorsement of the sum sworn to, as required by the statute. The court made the

Rule absolute.

It was objected, on the part of the plaintiff, that it should not be made absolute with costs, inasmuch as the defendant was not in custody, and had given no bond, and therefore in these respects the defendant had asked what could not be granted him.

Per Cur.—The defendant has asked more than appears to be required by the circumstances, but not more than it would be right to grant him, if he were really in custody, or had given a bail-bond. It is only where the party asks for something which the court denies him, upon the ground that he has no right to it, that the rule of practice applies. In such case, though his rule is made absolute as to part, it is without costs, because the adverse party had good reason for opposing him. It is otherwise here.

ANDREWS V. ROBERTSON ET AL.

Where a sheriff, being ruled to return a writ, enclosed it to the clerk of the crown, three or four days after the rule expired, so that it was not in the files when search made, but was produced in open court by the clerk, the court refused the attachment for the purpose of making the sheriff pay costs.

The sheriff of the District of Gore had been ruled to return a writ of execution; the rule expired on the 10th inst., and on the 14th an attachment was moved for, on an affidavit that upon searching that morning at the crown office, the writ was not returned; but on the motion being made, the clerk produced the writ, properly returned, it having been addressed under cover to him by the sheriff and received that morning, but not placed in the files before the search made.

The court, on this being shewn, refused the attachment. The plaintiff's counsel urged, that the sheriff should be made to pay costs, because, by not returning the writ on the 10th, he was in contempt; but the court said, they had yet made no rule, and had therefore no terms to impose, and they would not now order the attachment, merely for the purpose of discharging it with costs.

If the attachment had been actually ordered, it might have been otherwise; and the Chief Justice referred to the case of *Rex v. the Sheriff of Surrey*, 11 *Ea.* 591; 1 *B. & P.* 312.

Per Cur.—Rule refused.

REX v. SHERWOOD, ESQUIRE, SHERIFF OF JOHNSTOWN.

Rule to return *ca. re.*, in Trinity Term. In July the writ appears to have been in the hands of the plaintiff's agent, and in August the attachment issued. The court discharged it, on paying costs up to the time it was returned, although a trial had been lost.

Ca. re. returnable Michaelmas, 3 Wm. IV. In Trinity a rule is obtained to return the writ. The sheriff stated he had sent it in May. It seems to have been received and shewn to the plaintiff's attorney in July, and no attachment went till the 23rd of August. A trial had been lost, but not by the sheriff's not returning the writ, and the plaintiff seemed to have been dilatory in his proceedings.

ROBINSON, C. J.—The sheriff may be discharged from the attachment, on paying costs up to the time the return was received by the plaintiff's attorney or agent, which seems to have been in or directly after Trinity Term; and as the venue is in the Home District, where the assizes were not held till October, there was abundant time for the plaintiff to have gone to trial, if he had chosen to do so.

Per Cur.—Attachment set aside, on paying costs, up to the time of the return of the writ.

SIMPSON, ASSIGNEE, v. MATTHISON,

AND

WARD v. WARD.

When pending a motion to set aside proceedings for irregularity, defendant pleads, in consequence of which the plaintiff proceeds to trial, the court refused to set aside the verdict, or otherwise to interfere, though no defence made, no actual merits being disclosed on affidavit.

In the former case, the arrest in the original action was set aside, and all proceedings in this cause, *with costs*, by a judge's *order*. It has been moved in term, and cause agreed to be shewn before a judge at chambers. The defendant moved for an attachment for non-payment of these costs. Pending the rule *nisi*, and before it was made absolute, defendant pleaded *non est factum*, and two other pleas. The cause went down to trial in 1832, and a verdict was rendered for plaintiff. Judgment entered, execution issued, and money paid to plaintiff; and nothing done in

pursuance to the judge's order till about six weeks previous to this motion.

ROBINSON, C. J.—In this, as in Ward v. Ward, the defendant, desirous of taking exceptions probably with no merit in them, sends to his agent here to move ; but the assizes being near, and not confident in his grounds of irregularity, he fears to abide the event, and files a plea. By so doing, he waives the irregularity, and the order that may afterwards be made upon it, which is all a collateral proceeding. We cannot hold a right to elect, either to try or not, as he pleases. By filing pleas, he abandoned his motion against the plaintiff's previous proceedings, and renounced any benefit he might have had from the judge's order.

In the latter case, the defendant moved to set aside the verdict, on the ground that the plaintiff proceeded to make up his record, and try his cause, after his proceedings had been set aside for regularity. The process having been irregularly served (i. e., not by a *literate* person, as he signed the affidavit of service *with his mark*), soon after Trinity Term, an application was made at chambers to set the service aside. It did not appear that any notice was given to the plaintiff's attorney of the defendant's intention to take advantage of this irregularity. The agent of the defendant's attorney obtained an order, on the 23rd of Aug. last, that the service of the writ, and all subsequent proceedings had by the plaintiff thereon, should be set aside. The plaintiff's attorney knowing nothing, so far as appeared, of this motion, on the 5th August served his declaration ; and on the 13th August, the defendant's attorney, not having heard from his agent the result of the application, left a plea in the office, with instructions to file it if plaintiff's attorney came to sign judgment. Plaintiff's attorney forbore to sign judgment, and accepted the plea and gave notice of trial ; and learnt only on the day before the assizes that the order had been made to set aside the proceedings. He then heard that defendant meant to reply upon this order, and not to make a defence, but, supposing he had waived the irregularity by his plea, plaintiff took a verdict ; and now a motion was made to set it aside, on the ground that

he could not proceed after the judge's order. There was no affidavit of defendant's that he would suffer any injustice from the verdict. His attorney merely swore in general terms that, from what the defendant told him, he believed he had a good defence to the action.

ROBINSON, C. J.—It could only be an extreme case that would warrant our interposing under such circumstances, for clearly the defendant abandoned his objection to the service of process which had no merit in it, when he afterwards pleaded ; and he cannot revert to it now, or claim any benefit from the order that he had obtained. By pleading, he admitted that he was in court, and waived all objections to the service of process.

Per Cur.—Rule refused in each case.

RYAN ET AL. V. LEONARD, SHERIFF.

When an appearance was actually entered by defendant's attorney, although it seemed to have been mislaid by the deputy clerk of the crown, and the plaintiff served his declaration on the defendant, and not his attorney, and then signed judgment for want of a plea, the court set aside the proceedings, with costs.

The plaintiffs charged three persons in execution ; and it appeared on affidavit, that while so charged, it was agreed by plaintiffs' attorney that they should be discharged, and the undertaking of a third person taken for the debt, and one-half the costs, and in pursuance of this agreement, the attorney directed the deputy sheriff to credit him 10*l.* for the costs, and the defendants were discharged. The plaintiffs' attorney, in an account rendered, charged the deputy sheriff with this amount as received. Soon after the discharge of the debtors, the same attorney brought this action against the sheriff, of debt for the escape of those debtors, and signed judgment for default, which being in debt, was final ; and took out a *fl. fa.* against the goods, refusing to take the half of the costs in the former action, insisting on the whole. On search at the crown office, it appeared that the *ca. re.* in this cause issued on the 12th of June last returnable first of Trinity ; served on the 14th June ; application by the plaintiffs' attorney for the defendant on the

4th of September; declaration filed on the 5th of September; affidavit of service of declaration and notice on the 7th of September; judgment on the 19th; and *fi. fa.* returnable the 1st of Michaelmas term. No appearance by the defendant in person, or by attorney, is to be found in the office. The deputy clerk of the crown of Niagara made an affidavit, that common bail was filed and entered for the defendant on the 26th of June, by Warran Claus, Esq., and that he believes it was sent to York, with the other papers in the cause. Mr. Claus made an affidavit, that no declaration was served on him, as attorney for the defendant.

Draper, for defendant, moved, 1st, on the ground of irregularity, for proceeding as if defendant had not appeared, when in fact he had appeared by attorney; 2ndly, to set aside the judgment, on account of the action being brought contrary to good faith.

Spragge shewed cause.

ROBINSON, C. J.—It not being desired, that the defendant had, within the time, appeared by attorney in the regular manner, though the deputy clerk of the crown seemed to have mislaid the appearance paper, the defendant had done all that was incumbent on him, and no declaration having been served on his attorney, the judgment is clearly irregular.

Per Cur.—Rule absolute.

CROOKS V. HOUSE.

The court will not change the venue on the application of the plaintiff after issue, unless a very special ground be laid for it.

Judgment as in case of nonsuit was moved for, the plaintiff not having gone to trial at the last assizes for the District of Niagara, pursuant to notice; but the court refused the application, it being shewn on affidavit that during the assizes the defendant's attorney had applied to the plaintiff's attorney to withdraw his record, upon a promise that his client being made acquainted with the sum due, would pay it without further proceeding, in consequence of which the cause was not called and tried, as it otherwise

would have been; and at a late period of the assizes, the cause being called in the absence of the plaintiff's attorney, and no one appearing to answer for the plaintiff, it was struck out of the docket.

The cause being on this account allowed to stand over till the next assizes, the plaintiff moved for leave to amend his declaration, in order to change the venue from the district of Niagara, where it was laid, to the Home district, which would give him an opportunity to try at the spring assizes.

But the court refused the application, not thinking it to be consistent with general practice to allow the plaintiff to change the venue from the place in which he had himself laid it, after issue joined and the cause being taken down to trial, unless some very strong ground was laid for it; and they referred to the following cases, the most modern of which seemed against the application, though the case in Cowper, if not opposed by contrary decisions, would seem to warrant it.—6 Taunt. 408; 2 N. R. 58; 1 Price, 146; Str. 1162, 1202; Cow. 409; 1 Wils. 173; Barn. 19; 4 Ea. 433-5.

ROSS v. MCNAB.

When a new trial had been granted, to give a defendant an opportunity of setting up a defence, of which he did not avail himself, the court refused again to interfere.

This cause had been tried at a former assizes, in the district of Bathurst, and there appearing great reason to apprehend, from facts disclosed in another suit, tried at the same assizes, that the note declared upon was given in fact not to the plaintiff, but to another of the same name, and that it was fraudulently advanced, as if made payable to this plaintiff, the court set aside the verdict, to give the defendant an opportunity to make out this defence on another trial. At the last assizes, the plaintiff carried down his cause again and obtained a verdict, no defence being offered, and now a new trial was again moved for.

ROBINSON, C. J.—No reason is shewn why the defendant did not avail himself of the opportunity afforded him, by

setting aside the last verdict. If he had a good defence he should have shewn it.

Per Cur.—Rule refused.

LEACH V. STEVENSON.

In debt on an arbitration bond, where only one instalment of the sum awarded was due when the process was sued out; but the nonpayment of a second was, together with the first, assigned for breach of the condition. *Held*, that the plaintiff could assess his damages for nonpayment of both sums.

Debt on an arbitration bond. The condition was set out on oyer and the award shewn, which directed the defendant to pay to the plaintiff 10*l.* 6*s.* 5*d.*, in April, 1833, and a farther sum of 29*l.* on the 1st July following. *Non est factum* was pleaded to the bond, and the award was denied. At the trial, it was objected that the plaintiff could recover only the first sum awarded, the second not being payable when the suit was commenced; for it was contended that the suing out the process was the commencement of the action. The Chief Justice, at the assizes, directed damages to be assessed for both breaches, reserving to the defendant leave to move to reduce the damages to the amount of the first sum, if the court should think the second not recoverable under this record; and a motion to that effect was made.

ROBINSON, C. J.—Both sums were, in my opinion, properly included in the damages assessed. The verdict of course was generally for the plaintiff, for the penalty of the bond the cause of action, accrued upon the bond when the first instalment became due, and before the plaintiff assigned his breaches both sums were due, so that his damages, when he came to assess them under the statute, extended to the two sums, although only one could have been claimed when he sued out process in this action on the bond. Nevertheless, the penalty itself was then due, and any sum within the penalty which the plaintiff can shew himself entitled to upon the bond, when the plaintiff assigns his breaches, he can recover in damages. But at any rate I am inclined to think that here, as well as in England, the plaintiff's declaration, and not the suing out the process, is to be looked upon as the commencement of the action in

determining such a question as this, though with a view to the Statute of Limitations it would be otherwise. But that point we do not determine in this case.

SHERWOOD, J., and MACAULAY, J., agreed in the plaintiff's right to recover, under the circumstances.

Per Cur.—Rule refused.

DOE EX DEM. LAKE V. DAVIS.

In a second ejectment for the same promises between the same parties, proceedings were stayed for non-payment of the costs of the first ; the plaintiff proceeded notwithstanding, and was nonsuited for the not confessing lease, entry and ouster. The affidavit on which the defendant moved to set aside the proceedings, was so worded as to be evidently made in the first cause, but the court overruled this exception, and set aside the proceedings.

An action of ejectment had been brought between the same parties for the same premises, and after this action was commenced, an order for staying proceedings until payment of the costs of the first, was obtained. The plaintiff, without paying these costs (as it appeared), carried this cause down to trial, at the last assizes for the District of London, and was nonsuited, by reason of the defendant's not confessing lease, entry and ouster.

Barrett, obtained a rule *nisi* to set aside the notice of trial, and all subsequent proceedings, as irregular, being in opposition to the rule requiring the costs of the former action to be paid first. The plaintiff's counsel shewed no cause, except by taking an exception to the defendant's affidavit, as being entitled in the wrong cause. The style of both causes was exactly the same, but the affidavit stated "that the writs in this cause were still unpaid," which shewed clearly that the affidavit was intended to be, and in fact was, entitled in the first cause, whereas it was contended it should have been entitled in the second ejectment, because the motion to stay proceedings was in that action.

ROBINSON, C. J.—I have felt a good deal of hesitation upon this point of practice ; but on the whole I am inclined to overrule the exception to the entitling of the affidavit. In cases of actions or bail bonds, affidavits may for some purposes be entitled either in the original action or in the action against the bail. It does not appear to be an universal rule that the court will only make an order upon an

affidavit entitled in the same cause ; for we find that the court will notice and act upon affidavits when they are upon the files of the court, though they were read for other purposes and in other proceedings. The main question, I should think, is whether perjury could be assigned on this affidavit, if in fact the costs were paid. I do not see why it could not ; for the fact deposed to is material with reference to the first cause, that is, it is material in the first cause to enquire whether the costs have been paid or not, though the object of the inquiry happens to be to use the information in another cause. I am of opinion, notwithstanding the objection, that the defendant's rule should be made absolute.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Rule absolute.

DOE EX DEM. THOMPSON V. PUTNAM, ET AL.

The plaintiff set forth the particular lot he went for in his declaration, and the defendant entered into a general consent rule, not specifying the premises particularly. The plaintiff, after passing the record on this rule, entered judgment by default, treating the consent rule as a nullity ; and the court set the judgment aside as irregular, and held the defendant's affidavit entitled as under the consent rule, correct.

Ejectment. In the declaration, the particular lot for which the plaintiff brought this action was specified. The defendants' entered into a general consent rule, and pleaded the general issue, but did not recapitulate the premises for which they defended in the rule. The plaintiff accepted the plea and passed his record ; but afterwards determined to treat the consent rule as a nullity, and accordingly entered up judgment by default. The defendants moved to set this aside, and grounded their motion on an affidavit entitled as if the consent rule were in force : to which the plaintiff excepted, insisting that it should be entitled Doe ex dem., &c. v. Roe.

ROBINSON, C. J.—The rule of practice (Mich. 1 Geo. IV.) is, that the defendant shall specify in the consent rule for which premises he intends to defend, and shall undertake in the rule to confess that, at the time of the service, he was

in possession of the premises, &c.—7 T. R. 332, in notes. The whole object and reason of the rule is, that however general the plaintiff may be in his description, he shall know for what defendant means to defend; because it is to the land of which he admits himself to be in possession that the recovery is limited. If, however, the plaintiff will specify, as in this case he has done, naming the particular lot for which he goes, the defendant may, by saying that he defends for that lot, give as precise information as if he repeated it in his consent. It is not necessary to specify further than this rule makes it necessary, and we think the defendant has been sufficiently specific. But supposing the consent rule does not sufficiently comply with the rule, it is an irregularity, because it is in opposition to a rule of practice; but that rule being introduced merely for the ease and certainty of the plaintiff in his proceeding, he may waive it if he pleases. By doing so, if the defendant confessed possession of nothing specific, then the plaintiff would only be in the same situation as all plaintiff's were before this rule, and must prove defendant in possession of that to which he makes title.

We think this judgment against the casual ejector should be set aside as irregular, and we think also that the affidavit is rightly entitled in the cause as against Putnam and Putnam, the defendant having by the consent rule been admitted to defend in the stead of the casual ejector.

Per Cur.—Rule absolute.

In this term GEORGE SHERWOOD, WILLIAM B. WELLS, JOHN BELL, GEORGE C. STRACHAN and CHARLES L. HALL, Esquires, were called to the degree of Barrister-at-Law, and sworn in.

REGULA GENERALIS.

It is ordered, That after the first day of Hilary Term next, no attorney of this court shall issue a *capias*, as commissioner, in a case in which he shall be concerned as attorney for the plaintiff.

J. B. ROBINSON, C. J.
J. B. MACAULAY, J.

KING'S BENCH,

HILARY TERM, 4 WILL. IV.

SHUTER AND WILKINS V. LEONARD, ESQUIRE.

It is the duty of a sheriff who levies money under a *fi. fa.*, to pay it over to the party entitled thereto, and he cannot retain the writ to the crown office, and pay the money into the hands of the clerk of the crown, and thereby discharge himself from liability to the plaintiff in the original suit.

Assumpsit against the sheriff of the Niagara District, for money levied by him on a *fi. fa.*, at the suit of the plaintiff. The levy, &c., was proved, and on the defence it appeared that the sheriff, being ruled to return the *fi. fa.*, had returned it and the money levied upon it into the crown office at York, when the writ and money were received by the clerk of the crown, of which the plaintiffs had notice before they brought this action. It was then objected on the part of the defendant—

1st, That the plaintiffs should have brought debt, and not assumpsit.

2ndly, That the sheriff, having complied with the command of the writ, by returning it with the money levied into the proper office, was discharged, and not liable to the plaintiffs.

This case stood over for judgment from last term.

ROBINSON, C. J.—The first is clearly not a valid objection ; the books are full of cases where assumpsit for money had and received has been brought against a sheriff for money which he has acknowledged by his return to have been levied by him on a *fieri facias*.

The second point is new, and not unimportant as regards convenience in practice, and as regards the responsibility of the sheriff, in case of a possible loss of money so paid into court or into the crown office. I have endeavoured to come to a satisfactory conclusion upon it, and have formed an opinion against the objection, but cannot say that I have not some degree of doubt remaining. In reason, I feel that it ought not to prevail, but I find no express authority upon the point. The question amounts to this, Can the sheriff in every case at his pleasure put the plaintiff to the inconvenience of coming or sending to the crown office here for the money levied in execution, or is he not bound to pay it into the hands of the plaintiff? The command of the writ is, “and have that money before us, at York, &c., to be rendered to the said A. B., for his damages aforesaid.” It is certain that a change has taken place in the doctrine of the courts as to what the sheriff *may* do under this direction in the writ. In Com. Dig. Execution C. 5, it is said, “after the money is levied, the sheriff may pay it to the plaintiff,” but a doubt is intimated, grounded upon the case of Cannon v. Smallwood.—3 Lev. 203. In Bacon’s Abr., Execution, C. 5, it is said, that in strictness the money is to be brought into court ; and in Godbolt, 147, it is laid down more strongly, “that the sheriff *must* pay the money into court, and *cannot pay it to the party, except in court.*” But this is not sanctioned by modern authority ; and in 2 Show. 87, it is held otherwise, and that payment to the plaintiff is good ; and in Speake v. Richards, Hob. 206 ; Comb. 332, 430—where much is to be found bearing upon this question—it is laid down, that as soon as the sheriff receives the money he becomes debtor to the plaintiff, which necessarily implies that he may pay the money to him. But it is not now to be doubted that he *may* pay to the plaintiff ; the only doubt is, whether he is not bound to do so, unless indeed

restrained by an order of the court. In Clarke v. Withers, 2 Lord Raym. 1074, the question was, whether the death of a plaintiff after goods seized on a *fi. fa.*, would abate the execution ; and Lord Holt says, "after seizure of the goods, there is nothing to be done by the sheriff but to bring the money into court ; though indeed if he pay the money to the plaintiff, that is well ; and the death of the plaintiff after the seizure does not hinder the sheriff from executing the remainder of the writ, which is to bring the money into court." And again, "Here the sheriff has become responsible to the executor for the value he has returned the goods at, and when that right has come to the administrator, *de bonis non*, the sheriff shall bring the money into court, and upon the administrator coming in, and shewing his letters of administration, he shall take it out."

From this case I collect, that undoubtedly the sheriff may pay the money to the plaintiff ; that when he has levied it, he is debtor to the plaintiff, or his executor if he dies, and that he is regarded as having it in court, to be paid over to the party entitled to it ; not that he can as of course pay it into court and discharge himself : and this, I think, is supported by what is said in 3 Lev. 204, and Dyer 76, "that plaintiff dying, the sheriff may bring the money into court, until administration granted, if there be neither executor nor administrator." It accords also with the command of the writ, "to render to the said A. B.," and with the sheriff's return, "which money I have ready to be rendered to the said A. B. for his damages." Upon that return an action for the money lies, which shews that the law regards it as properly remaining with him for the plaintiff's use. In 1 M. & S., 599, the court say, the sheriff having levied the money, is *bound* to pay it over. In Butler v. Butler, 1 Ea. 339, the sheriff, finding conflicting claims set up to the money he had levied on a *fi. fa.*, moved to be permitted to pay it into court to the use of the person who shall be found entitled to the same, and the court refused the application. Now here it is expressly stated, that both parties refused to indemnify the sheriff, and if he could of right pay the money into the office of the court, as was done here, he could have

set the contending parties at defiance, and need not have made the application which was refused.—*i Chit. Rep. 577*; *7. Taunt. 794*. This and many other cases of the same description, seem to lead conclusively to the opinion, that the sheriff is not allowed to pay the money into court at his pleasure, for it is certain if he could, he need not trouble himself to ask for indemnities, nor ask for the interposition of the court, nor need such an action as that of *Dale v. Birch*, *3 Camp. N. P. C. 349*, have been brought to try the question, whether the sheriff was bound to send the money to the plaintiff, or could legally wait till he called for it. To have paid it into court, would have been safer and more convenient than to run the risk of that action. It is further to be considered, that the invariable usage is to pay the money to the party, and for this trouble and the responsibility of its custody, the sheriff is allowed in poundage.

On the whole, I cannot say I have much doubt that this objection should be overruled. If the sheriff had no design to act vexatiously, but paid it over supposing it proper, and that it could not be excepted to, the court upon a full view of the facts, have the power of making such order in respect to costs as will afford him just protection upon the principle of the case of *Jefferies v. Shepherd*, *3 B. & A. 696*. That may be the subject of application hereafter.

A third objection was taken, that a demand was made on the 28th, and the promise in the declaration only stated to have been made on the 29th, and no demand before process sued out; but independently of the question whether we are not to look on the declaration as the commencement of the suit, no demand is necessary when the action is by the plaintiff in the execution, for whom expressly the money was levied.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Postea to the plaintiff.

CAMERON V. FERGUSSON

In case for a malicious arrest, the declaration, and not the writ, was held to be the commencement of the suit.

Case for a malicious arrest, in a suit brought in the District Court of the District of Bathurst. The suit in which the arrest was made, was no otherwise at an end than by being out of court according to the practice, on account of the lapse of more than a year without any proceeding after the writ. This year had not expired, however, when the process in this cause was sued out, viz., 14th May, 1832, nor until three or four days afterwards, but expired long before the plaintiff declared, which was not until the 14th of July, 1832. If upon evidence of the cause of action at *nisi prius*, the writ is to be accounted for all purposes the commencement of the action, then this suit was brought too soon; but if the declaration is to be regarded as the commencement of the action, then the plaintiff did not begin too soon. At the trial, at the last assizes for the Bathurst District, the plaintiff had a verdict, subject to the opinion of the court on this point.

The case was argued last term, by *James Boulton*, for the plaintiff, and *Small*, for the defendant, and judgment was this day given.

ROBINSON, C. J.—In my opinion, the declaration is to be regarded as the commencement of the action here as well as in England, except with respect to the Statute of Limitations, and those cases where the plaintiff is held by statute to sue within a certain time—there he is considered to save the time by suing out process. But that for the purpose which you use the question, the declaration, and not the process, would be held in England to be the commencement of the action, is fully settled upon numerous authorities.—2 Lev. 13, 176; 8 Mod. 343; 2 Lord Ray. 882; 2 Saund. 1, n.; 1 Wils. 147; 2 Burr. 960; Cowp. 455; 2 Bl. Rep. 924; 7 T. R. 4; 3 B. & P. 343; 4 Ea. 76; 11 Ea. 118; 2 Chit. R. 11. After pausing the point through these cases, and attending to the language of the court, I can find no ground whatever on which to rest a distinction in this

province from any peculiarity in our proceedings. Our Statute, 2 Geo. IV., says the original process for compelling the appearance in any suit, shall be a *capias*, &c. That brings us emphatically within the reason of almost every case, in which the court repeats “the writ is only process to compel appearance.” What *they say*, our *statute* expressly *declares*. It is true, that on our non-bailable process, a notice is endorsed, requiring the defendant to appear in *that* action, from whence it may be urged, that the commencement of the *action*, by suing out the writ, is by that very expression established, because at that moment there is but the writ, and the notice can refer to nothing else. That is very true, and so the courts in England do, for many purposes, allow that the writ is the commencement of the action; and yet, in a case like this they hold, and very reasonably too, that for the purposes of evidence, the declaration, in which the plaintiff first sets out his complaint in form, is to be looked upon as the commencement—it is the grievance or claim which the plaintiff alleges, and which the defendant has been brought in court to answer. And no argument can be drawn from our notice, which would not apply with quite as much force in England. There a *latitat* bailable contains an *ac etiam*, specifying the real cause of action in general terms, as our writ does, and an affidavit must have been made of the true cause of action precisely as with us; and the non-bailable *capias*, both in the King’s Bench and Common Pleas in England, has the same notice endorsed as ours, calling on the defendant to appear “to this action.” Yet in both courts, and in all these cases, the bill or declaration is regarded generally as the commencement of the action. In the case in 2 Lev., the court say, that as the court of action accrued *before bail put in*, though after an arrest on a *latitat*, it is good.—In Perry v. Kirk, 8 Mod. 143, the court, under circumstances precisely similar, allow the plaintiff to recover for a cause of action accruing after the arrest, saying that the “declaration is the only thing of which the court ought to take notice;” and they declare the distinction to be “that he cannot declare before the cause of action arises.” In John-

son et al. v. Hargreaves, 2 Burr. 950, Lord Mansfield, in a most luminous and comprehensive manner, considers the question, what is the commencement of a suit, with reference, however, to the Statute of Limitations; and though he shews the suing out a *latitat* to be clearly the commencement of the action, when the plaintiff chooses so to treat it in order to save the statute, yet he is no less clear than other judges in regarding the declaration, not the *littitat*, the commencement of the action in such a case as we are now considering. I need but to refer to Foster v. Bonner, Cwp. 655, in proof of this, where his Lordship says, "by the general course of this court, the action is not deemed to be brought till the bill is filed, and that is the commencement of the suit." It may be imagined, his Lordship intended a technical distinction between the bill of Middlesex, which in fact is process, and the declaration; and that what he says of the one, he would not have extended to the other. But I am clear this is not so, for he thus expresses himself in the same judgment, "the *latitat* may be before the cause of action, but the *declaration* cannot be till after." In the conclusion of his judgment, Lord Mansfield adds, "In this case it (the *latitat*) is but process, and therefore if the injury is done before the action brought, it is sufficient and the action is not brought till the *bill is filed*. Upon the whole, as to a *latital* under the Statute or Limitations and penal statutes, &c., it has been considered in the nature of an original writ in C. B.; but under the general practice of the court, it is a mere process or summons, and its time of issuing immaterial." Most certainly our *capias* is but process. It is expressly so called in the statute, and our non-bailable process is but as a summons, in the words of Lord Mansfield, not specifying the cause of action more particularly than the *capias* in either court specifies it in England. In the Common Pleas, the *capias* is expressly recognized as the commencement of the suit—Leader v. Moxem, 2 Bl. R. 924; but in Davis v. Owen, 1. B. & P. 243, Mr. Justice Buller observes, "as a writ of *capias* never appears on the record, it is of no consequence whether it bear *taste* before or after the cause of action accrued." The cases of Best v.

Wilding, 7, T. R. 4; Swancot v. Westgarth, 4 Ea. 76; and Hall v. Odber, 11 Ea. 118—leave no doubt in my mind. In them the court notice the possible circumstance of a defendant being actually arrested before the cause of action accrued, and state the certainty that he would obtain relief from the interposition of the court; but that the plaintiff's action would nevertheless be sustained if it accrued before he declared. The law has always been so understood here, so far as my knowledge extends; for without reference to process, it has been thought sufficient if the plaintiff, by a special memorandum, prevents the apparent repugnancy on the record of declaring for a cause of action which had not yet accrued. It is very certain that there is a difference between our process and that issued in England, in order to the commencement of a suit, but no solid reason can be founded on that difference, in my opinion, for refusing to allow a plaintiff to give evidence here, as well as in England, of any cause of action accruing before he declares: both are processes to bring the party into court to answer a case which is yet to be stated in form. In England, when the defendant is arrested upon the *latitat* or upon the *capias*, he gives bail to answer a cause of action which is specially stated and sworn to: it is the same here, and the *ac etiam* narrows the description of action as much as our *capias* does. In England, when the party is not arrested on the *capias*, he has notice served on him to appear and defend *this action*. It is the same here. In England, the process is acknowledged to be the commencement of the action in fact, when that is material on the Statute of Limitations. It cannot be more than the commencement of the action here. Though it is admitted to be so in one sense in England, they look at the declaration as the action, in a case like this, and so, I think, must we.

SHERWOOD, J., concurred.

MACAULAY, J.—If the writ of *capias* in this court was, as respects the point raised, to be regarded as bearing strict analogy to mesne process in the Court of King's Bench in England, I should think, that for the purpose of meeting the present objection, it might be treated as merely process to

bring the defendant into court to answer, and that the declaration constituted the commencement of the suit. But it does not appear to me, that the fictitious rules which prevail in the English courts on the subject of process apply to this court. Our jurisdiction springs from a different source. This court possesses by statute original jurisdiction, and no usurpation of authority or formal fictions are requisite to clothe it with power. Suits originate in this court; and although its jurisdiction is imparted in very comprehensive terms, an examination of the provisions made by the provincial statutes on the subject of process, leads me to the conclusion, that however extensive the jurisdiction, the writ is issued in the particular cause exclusively, and forms at present the first step therein, and that an appearance to the writ, is an appearance in the individual suit, and not generally, as in England. The statute, 34 Geo. III. c. 2, s. 5, which constituted the court, enacted that the original and *first* process should be by writ of *capias ad respondendum*; and in order that the defendant might be immediately apprised of the cause of complaint against him, that the said writ should state the form of action, and refer to the declaration, which should always be annexed to and served with the writ; and further, that in non-bailable cases, no process should issue at the suit of any plaintiff, until the declaration on which it was founded was filed in the office. The statute 37 Geo. III. c. 4, s. 4, enacted that in non-bailable actions, the first and original process should be by writ of summons, according to the form given, which refers to the declaration annexed.

The statute 2 Geo. IV. c. 1, s. 4, enacted, that the original process for compelling the appearance of the defendant in any suit to be brought in this court, should be a writ of *ca. ad re.*, a copy of which should be served on the defendant personally. A form of the notice to be indorsed is also added, similar in terms to the one given in the 34 Geo. III. c. 3, both corresponding with that used in like proceedings in England, and concluding by informing the defendant that the object of the service was to compel an appearance, in order to his defence in that action. Under

the statute 2 Geo. IV., the declaration does not precede the writ, and is not annexed to it, but is filed after appearance. It is obvious, that from the creation of this court, in 1794, until the year 1822, the writ could not have been mere process to bring the party into court; and I perceive nothing in the act of the latter year extending to it that quality. The statutes prescribing the process do not adopt the English practice bodily and as a system, but certain specific provisions are made, analogous, but not precisely similar to, some portions of that system. The English practice, in more enlarged terms, was introduced by rules of court, the last of which was promulgated in Michaelmas Term, 1833. If it was competent to the court to give to the first process by rule of court the character and effect contended for, and the rule now in force is sufficiently comprehensive to impart the same, the matter is already settled; but I do not conceive that the court have the power, or that the rule is framed or calculated to create any such change. It rests, therefore, in construction upon the statutes; and as they do not profess to place the first process upon a footing similar to the English system, and indeed clearly indicate a contrary intention, I do not feel warranted in assuming that such is nevertheless the effect and scope of the enactments of the legislature.

It would, in many respects, be found convenient to assimilate the process and practice of this court and the English courts on this head. On some occasions it would prove otherwise; but as the distinction between what I take to be the legislative provisions here, and the rules of proceeding in England, arising from long usage and peculiar circumstances, involves principles of important and extensive operation, I do not perceive any well-grounded authority to justify the recognition by construction of those principles which obtain there, and which are of peculiar origin, and owe their adoption to local expediency.

Per Cur.—Postea to the plaintiff.

McDONALD, Q. T., v. KIRKPATRICK.

Where A., having purchased a lot of land at sheriff's sale, for 82*l.*, and being unable to pay it, agreed with B. to give him a deed of this land if he would pay the sheriff, upon an agreement that if A. paid B. 132*l.* in three days, A. should have the land ; and B., an attorney, having an execution which he had no mode of satisfying but by getting something out of the proceeds of this land, made the advance on those terms, and receiving the 132*l.*, paid over the 50*l.* to his client —*Held*, to be usury in B.

Debt to recover a penalty on the Statute of Usury. The declaration contained several counts, setting forth the occasion which lead to the borrower requiring the money, and that security was given by a conditional conveyance of real estate, for its repayment, or rather by a conveyance of real estate delivered as an escrow, and not to take effect, unless the borrower failed in repaying the money on a day named. In the last count it was charged generally, that the defendant, on the 16th of March, 1833, upon a corrupt contract made on that day, took and received from one David Barker Hill 132*l.*, by way of corrupt bargain and loan, for forbearing and giving day of payment of 82*l.*, on the 13th March, lent and advanced by defendant to Hill, from the 13th to the 16th March, 1833, which sum of 132*l.*, received in manner and for the cause aforesaid, exceeds six per cent. per annum.

It appeared that the defendant (an attorney of this court) had been professionally employed by Messrs. Maitland Garden and Auldjo, of Montreal, who had demands against the estate of the late James Cummings, of Hallowell, to attend to their interests ; that an execution was issued against the lands of the deceased, at the suit of other creditors, and that several ineffectual attempts to sell (the price is hereafter mentioned) had been made, when the defendant attended on behalf of his principals, and assented to or desired the postponements ; that on Saturday, the 9th March, 1832, the north half of Lot No. 5, in the 2nd concession of Hallowell, containing about 100 acres, was sold by the sheriff of the Midland District, at the suit of Mr. Washburn, to one Hill, for 82*l.*, in the absence of the defendant ; that time was given to Hill, until Wednesday, the 13th of March, to pay the purchase-money ; no written contract,

however, being entered into between Hill and the sheriff. On the 13th, Hill applied to the defendant to lend him 82*l.*, who said he was authorised to have given 300*l.* for the land, his employers being creditors of the estate, and the assets exhausted; and expressed his willingness to take the bargain off of Hill's hands. Hill not acquiescing in the proposition, the defendant offered him 25*l.* in addition to the 82*l.*, which he refused to accept, but offered the defendant 25*l.* for the use of 82*l.* for three days. The defendant did not assent to this, but said he would take 50*l.*, which Hill agreed to give. The parties then went to the sheriff, to whom defendant complained of not being apprised of the sale. The sheriff replied, that word had been sent to his office. The defendant explained, that he had agreed to advance the 82*l.* for Hill, and accordingly gave a cheque for that amount to the sheriff, which was accepted in satisfaction of the purchase-money between the sheriff and Hill. The sheriff executed a deed of the land in favour of Hill, and delivered it to him. The account of this interview, as related by Hill, on the part of the plaintiff, and by the sheriff, on the part of the defendant, did not correspond; the latter representing, that the defendant clearly explained, that he was acting on the part and for the benefit of Maitland, Garden and Auldjo, who were to reap the fruit of the additional payment of 50*l.*, to be made by Hill, which sum was stated to be an advance of so much on the original purchase, the defendant having stated that Hill was to pay 50*l.* in addition to the 82*l.* for the land; while on the other hand, Hill denied that such were the terms of the arrangement, but that the 50*l.* was to be a bonus or interest upon the advance of 82*l.* for the loan and forbearance thereof for three days, and for the personal benefit of defendant, as he understood and conceived. It appeared to have been further agreed, that Hill should convey the land in question to the defendant, upon condition that if he paid the 82*l.* and 50*l.*, being the 132*l.*, on Saturday, the 16th March following, then the conveyance was to become void, but that should he fail to do so, the land was to be absolutely the defendant's. This arrangement was not reduced to writing, all being by

parol ; and there was no express undertaking on Hill's part to pay the 132*l.* at all events. However, an absolute deed in fee was executed by Hill to defendant, and with the sheriff's deed deposited in the hands of Mr. Smith, a clerk of the defendant's, to be returned to Hill, should he pay the sum of 132*l.* on the Saturday following, or to be absolutely and finally delivered to the defendant, in the event of his failing so to do. The consideration mentioned in the conveyance to the defendant, was 132*l.* The testimony did not correspond precisely as to the circumstances attending the execution of the deed. Hill stated that he had signed the deed upon a previous understanding that it was to be delivered conditionally only, and placed in the hands of Mr. Smith, for the purpose above mentioned ; that he recollects no formal act of delivery, but that he would have made one, had it been desired. Mr. Smith, on the contrary, represented that the deed was finally delivered to the defendant, and that after it was in his hands, but not before, (that he heard) it was suggested by Hill that it should be deposited with a third person, in which the defendant acquiesced ; but both witnesses agreed, that immediately upon its signature or execution, it was (whether previously so agreed or finally delivered or not) placed in his hands, to be restored to Hill, if he paid at the day, or to be finally delivered to the defendant, should he fail. Mr. Smith did not fully understand the nature and object of the transaction, until after the deed was made and Hill had departed. It further appeared, that on Saturday, the 16th, Hill paid the 132*l.* at the defendant's office, which he accepted, and delivered up the two conveyances to Hill, who was tearing his name off the one made to defendant, when the defendant insisted upon its total destruction—a request with which the former refused to comply. The defendant said, he need not think to get a catch upon him, and ultimately the clerks of the defendant took from Hill the instrument by main force, when he retired, leaving both deeds behind him. The sheriff's deed was afterwards brought to him by a friend, and the conveyance to the defendant was produced by the latter at the trial, upon notice, the name of Hill

having been cut out. It was also shewn, that in the following week the defendant remitted the 50*l.* to Maitland, Garden and Auldjo, who received and placed it to the credit of Cummings' estate. At the trial, it was maintained, on the plaintiff's part, that the 50*l.* had been received for the loan and forbearance of the 82*l.*, and therefore that the transaction was usurious. On the defendant's behalf, it was contended that the 50*l.* was an advance upon the original purchase ; that in consideration of the defendant's advancing the 82*l.* to the sheriff, Hill agreed to convey the land to him, with leave to re-purchase or redeem it, by paying the sum of 132*l.*, a few days afterwards. It was also asserted, that the arrangement was for the exclusive benefit of Maitland, Garden and Auldjo, and the estate of Cummings, without any personal advantage to defendant, and that Hill knew it. The evidence on some points was conflicting, especially as to Hill's knowledge or ignorance of the motives and objects of the defendant in exacting the 50*l.*, as to what was said at the sheriff's ; as to the precise circumstances under which the deeds were placed in Smith's hands ; and as to the misunderstanding that accrued after the money had been paid to the defendant on the 16th of March. After the plaintiff's case had been closed, the defendant's counsel moved for a nonsuit, on the following grounds :—

1. That the special matters of inducement had not been proved as laid ; that there was no proof in writing of the alleged sale by the sheriff ; and no execution or authority to warrant any such sale produced.
2. That the deed from Hill to the defendant had not been proved by a subscribing witness, which was necessary, being produced by the defendant, on the plaintiff's notice and call.
3. That there was no contract of loan proved ; that there was not a mutuality ; that Hill had not agreed to pay the 50*l.* and 82*l.*, or either of them ; at all events, that defendant had no means of compelling him ; that there was no written evidence of any agreement ; and that the agreement proved verbally, amounted to a conditional sale and purchase.

4. That the facts in evidence do not support the charge of usury; that they do not shew a loan and forbearance, but a sale or purchase, subject to a redemption or re-purchase; that it was in the election of Hill to repay or not—to redeem the land or not, and that if he declined doing so, the defendant could not enforce payment at all, but must retain the land as his only satisfaction; that it was in Hill's election to pay the 132*l.*, and to regain the land, or to decline the payment, and allow the defendant to hold the land absolutely; and that this is not usury, though he prefers paying at the day, and the money is received.

5. That there is no sufficient proof that the defendant advanced the money as averred; that a cheque (not produced) was said to have been given and accepted, but that it was not proved to have been paid.

It was left to the jury to say, whether as between Hill and the defendant, it was agreed, that the 50*l.* were to be added to the purchase-money, so as to form a rise therein; or exacted as a compensation for the advance of the 82*l.* It was observed by the judge at *nisi prius*, in charging the jury, that the defendant, having acted with a view to the pecuniary advantage of Maitland, Garden and Auldjo, would not affect his liability, if for their sake he entered into a usurious contract; that if in order to protect his employers, he procured the purchase to be enhanced 50*l.*, for their benefit on the one hand, and for the benefit of Cummings' estate on the other, it would fall short of usury; but that if the defendant demanded the 50*l.* for the accommodation, for the loan and use of the 82*l.*, it would be usurious; that if he, on behalf of Maitland, Garden and Auldjo, obtained the price to be enhanced 50*l.*, he would be free from the imputation of usury; but if extorted (from whatever ulterior motive) for the loan and forbearance of the 82*l.*, he would incur the penalties of that offence. The jury found for the plaintiff, thereby affirming the latter to be the true complexion of the transaction.

Draper, in Michaelmas Term, moved to set aside the verdict, and enter a nonsuit.

Sullivan sheweth cause, and the cause stood over for judgment.

ROBINSON, C. J.—(After stating the case.) Whether this be usury or not, is the main question. As to the other objections, I think they have no weight. What the defendant calls inducement, is the plaintiff's statement of the occasion he had for borrowing the money, which it was wholly unnecessary to state. It is not averred, that Hill received his deed from the sheriff; and there can be no reason whatever why it should have been proved, if Hill gave and the defendant received a deed of the land as security—that shews he accepted it as sufficient, and it is of no moment whether Hill had a title or not; it does not affect the transaction. All that is averred in the first count is substantially proved. It is expressly averred that Hill made a deed to the defendant, and delivered it to Smith to be delivered to defendant if default was made. If this statement was repugnant or informal, the defendant should have demurred; or if there be ground, he can move to arrest the judgment. But to common apprehension, the meaning is evident and the narration consistent, and the proof agreed with it. He delivered the deed into the hands of Smith, to be delivered to the defendant, if the 13*2l.* should not be paid in three days.

The deed to defendant was not proved by a subscribing witness, but it was produced by the defendant on a notice, and his defence at the trial, and his argument here, and the very point submitted to the jury, implied an admission of the transaction as stated in the first count, including the execution of this deed.—3 Taunt. 60.

There is certainly no force in the objection, that money did not actually pass from the defendant into Hill's hands. The 8*2l.* was paid by the defendant to the sheriff for him, and the payment was admitted all round; the sheriff treated the bargain as completed, and the defendant treated with Hill as the owner of the land. He got therefore the full benefit of the advance, whether the sheriff was paid by a cheque, or by specie, or by goods. For all that appears

the sheriff received what he admitted to be cash, whether in a cheque or in bills.—11 Ea. 618 ; 4 Ea. 199.

Upon the main question, the case really seems to me to present no ground for doubt. I mean the question, whether this was or was not an usurious transaction. At the trial, it was left to the jury to find whether the proper character of the transaction was that of a mere agreement to enhance the purchase, or whether the 50*l.* was received for the forbearance of the 82*l.*; and they found it was exacted as the consideration of the forbearance. I have looked with some anxiety into the particulars of this case, because I am under the impression that the defendant was not certainly aware that the arrangement he made for the benefit of his clients would constitute usury; and I indulge also the belief, which is justified by the defendant's general character and his standing in his profession, that if he had been convinced that the law would stamp the transaction as usury, he would not have been carried so far in his zeal to serve his clients, or in the zeal which may have actuated him to remedy, in this manner, a want of prior care and diligence on his part, from which his clients were likely to sustain an injury. Nevertheless I think, from the complexion of the whole case, that he seems to have had some doubts whether the course he was taking was clear of difficulty; and, at any rate, his misapprehensions or his motives cannot decide the question.

The statute was passed to protect borrowers from unreasonable exactions—that is the primary object; and to effect the receiving more than legal interest on a loan, is made penal. It would signify nothing, in my opinion, if both parties had been unconscious that taking 50*l.* for the loan of 82*l.* was in any case prohibited; and I think it signifies as little that the object of the lender in exacting the 50*l.*, in this case, was to serve others rather than himself. Smuggling is no less penal when the object is to serve a friend; and in respect to graver offences, it would be no mitigation that the inducement was to gratify the malice of a third party. In this case, it is very material to the character of the defendant that the transaction was one which he may

have thought was not usurious, and that he was to derive no direct pecuniary benefit himself from the excessive interest received ; but the plaintiff's right to succeed in this action of debt, on the statute, depends upon the simple question, whether the statute has been infringed. In some cases mistakes in regard to facts, and in others inevitable necessity, may relieve, when the letter of a statute has been contravened ; but neither of the grounds I have mentioned comes within the principle of those exceptions. All are bound to take notice what the law is and to keep within it, at their peril. The plaintiff here sues upon our provincial statute, 51 Geo. III. c. 9, which enacts (sec. 6) "that it shall not be lawful, upon any contract, to take, directly or indirectly, for loan of any moneys, wares, merchandise, or other commodities whatsoever, above the value of six pounds for the advance or forbearance of one hundred pounds for a year, and so after that rate for a greater or less sum or value, or for a longer or shorter time ; and all bonds, contracts and assurances, whatsoever, whereupon a greater interest shall be reserved or taken, shall be utterly void ;" "and every person who shall directly or indirectly take, accept or receive, a higher rate of interest, shall forfeit and lose, for every such offence, treble of the value of the moneys, wares, merchandise, and other things, lent or bargained for, to be recovered by action of debt in the court of King's Bench, one moiety to his Majesty and the other to him that shall sue." The British statute, 12 Anne, ch. 16, has been closely followed by our statute, so far as it respects the making void the sureties taken upon usurious contracts. In part of the clause, which attaches the penalty to the act of receiving more than legal interest, our statute varies from the 12 Anne, by plainly imposing the penalty for the mere act of "directly or indirectly taking and receiving" a higher rate of interest than six per cent. ; while the language of the 12 Anne is, "that every person who shall, upon any contract to be made after 29th September, 1714, take, accept and receive, by way or means of any corrupt bargain, loan, exchange, shift or contract, of any wares, merchandise, or other thing whatsoever, or by any deceitful

way or means, or by any covin, engine, or deceitful contrivance, for the forbearing or giving day of payment for one whole year, for their money or other thing, above the sum of 5*l.* for the forbearing of 100*l.* for a year." I consider the words "directly or indirectly," used in our statute, equivalent to all the words "by any covin, shift," &c., which are introduced into the British statute; and the only apparent difference is that the latter says, if any person shall, upon any contract, take or receive, &c., seeming to require some proof of contract for illegal interest, made after the day named; whereas the provincial statute annexes the penalty to the mere act of receiving, saying nothing of contract, or of deceitful means or contrivance.

If there be any substantial difference, therefore, our statute is the more comprehensive of the two in its application; but I should not think it safe to rest upon the opinion that there is any substantial difference between them, and I only remark the degree and manner in which the language differs, for the purpose of shewing, that whatever construction prevails in regard to the British statute cannot (to say the least) be relaxed in respect to the statute of this province. In many cases, where there was not a loan in terms, but where the apparent effect, nevertheless, was to give to a person advancing money more than legal interest for the use of it, it has been (and in all such cases it must be) left to the jury to say whether the transaction was in reality a lending of money, though not so in form, and whether the giving to the matter the appearance of a bargain of another kind, as, for instance, a trading in stock or the renting of a house, &c., was not a mere evasion to elude the statute.—*Cro. Jac.* 440, 508. Judges cannot intend fraud: Juries must give their verdict upon the question; and therefore in all such cases the doubt at last is, whether the jury have acted reasonably or not in coming to their conclusion.—*Doug.* 736; 1 *T. R.* 534; 3 *B. & A.* 664; *Cowp.* 775.

In the case before us, the jury were called upon to say what they thought of the transaction, and they have declared that the 50*l.* was taken for the forbearance of 82*l.* for three days; and I cannot see how they could possibly have said

otherwise. Here was no dealing differing in appearance from a loan, and only detected to be a loan by marking its concealed object and effect. There was a direct loan ; a certain sum of money (82*l.*) lent for a certain time, three days, to be then repaid, with 50*l.* to be given for the advance ; and that 50*l.* was received, together with the principal, at the time appointed for the re-payment. In *Barclay q. t. v. Walmsly*, Lord Ellenborough says : "To constitute usury, there must be either a direct loan, and a taking of more than legal interest for the forbearance of repayment, or there must be some device for concealing the appearance of a loan and forbearance, when in truth it was such." The case before us comes within the first and plainest part of this definition.

In *Hammett v. Yea*, 1 B. & P. 151, *Eyre, C. J.*, lays down the proposition broadly, "that when a party on a contract for a loan intentionally takes more than five per cent. per annum for forbearance of that loan, he is guilty of usury." I cannot see in what part this proposition fails in its application to this transaction. I would refer also to the judgment of *Rooke, J.*, in the same case.

In *Lloyd q. t. v. Williams*, 3 Wils. 362, *De Grey, C. J.*, says : "To constitute the offence for which this action is brought, to recover treble the value of the money lent, these three things must concur—1st, a contract between the parties ; 2ndly, moneys or other things lent ; 3rdly, above five per cent. per annum received by the lender for the forbearance. And whenever these three matters concur, the offence is committed.

It is said this is no absolute loan, because there was no undertaking absolutely to re-pay, but only a condition that if the 82*l.* was not repaid, the land was to belong to the defendant ; but both reason and authority are against this objection. In *Murray v. Harding*, 3 Wils. 396, the court say that a sale is where no loan is contemplated, where a loan is not treated of. Surely that cannot be said here, for a day of repayment was set, and it was observed, and the money repaid according to the contract.—2 W. Bl. 863. The well known case of *Abraham v. Bunn*, Burr. 2252, was

precisely such a case as this, so far as such an objection would apply; but the only question was, whether the borrower was a competent witness to prove the usury. Lord Mansfield says : "He, (the borrower) proved no bond, or assurance, or contract for usury at the time of the loan, or for re-paying the money, nor was such additional security necessary, because the pawn (which was double the value of the debt) was the security, and was sufficient to pay it, unless redeemed." Every word of this applies here. It would be no express contract to repay; the land was treble the value of the debt, and was sufficient to pay it unless redeemed. It is, in fact, the common case of pawn-brokers, who are satisfied with their pledge and take no specific contract for re-payment; still the money they advance is a loan, and if they receive it back with more than legal interest they commit usury. In 3 Atk. 280, the reasoning of the court applies strictly to this case, and shews that there is nothing in the idea that there could be no loan, or power to redeem, without an express undertaking to repay the money ; but here, indeed, there was a time set for repaying the money. It is very easy to suppose such a transaction as would have given the defendant 50*l.* for advancing 82*l.*, without subjecting him to the penalty, as, for instance, if the defendant had said "I cannot lend you money, and if you are not able to pay you should not stand in the way of my serving my clients, but allow me to take the bargain off your hands." And if Hill had consented, and allowed the land to pass into his hands, and afterwards, having procured funds, had solicited the defendant to allow him to get the place back, but the defendant had refused, unless he would give him 50*l.* for the bargain, that would not have been usury, because, in the language of the several cases, no loan was originally contemplated ; and unless in such a case the jury should have found that in truth a loan was intended, and that the sale was a contrivance or pretence, there would have been no offence against the statute. But here Hill asks for a loan. The defendant says I will not lend you the money, but I will advance you 82*l.* for three days on your securing me on land to three times the

amount ; if you re-pay me in three days, and give me 50*l.* more, you shall have your land again, otherwise I am to keep it. It is absurd to say this is not a loan ; and when the 82*l.* is re-paid in three days, and 50*l.* given for the accommodation, it is strange to say that more than legal interest has not been received for a sum lent.

I cannot clearly comprehend what ground there is for inquiring whether this was a loan, or merely an agreement to enhance the price of the land to Hill, the purchaser. If the defendant had said, I will not lend you the money, to enable you to get the land, for so trifling a sum ; but if you will agree to give 132*l.* for the land, I will lend you 132*l.* and take security on the land, then indeed this would have been a mere arrangement for enhancing the purchase. But the defendant lent but 82*l.*, and took 50*l.* for a premium, exacting that because Hill was reduced to borrow, which is precisely what the statute is intended to prevent. True, he made this bargain and took this money as agent, (but without any instruction from his principal.) I find no authority for making a difference on that ground ; if any can be shewn, I shall be glad to be referred to it.

As the case stands, I am of opinion, to use the words of the Court in Wade q. t. v. Wilson, Cowl. 112, that the "usury is an undeniable conclusion from the facts." "If the substance is a loan of money, nothing will protect the taking more than five per cent," is the strong language of the court in Foyer v. Edwards.—1 Atk. 340 ; 4 T. R. 356. And in Roberts v. Tremayne, Cro. Jac. 508, the court say "Usury may be apparent to the court, and then the jury need not show that it was corruptly done for *res ipsa loquitur.*" But here it has been declared by the jury that the 50*l.* was paid as a premium for the loan. I think it clearly was so, and that the postea must be given to the plaintiff.

The plaintiff has, by some confusion, stated in all the counts, that the 132*l.* was taken for the forbearance of 82*l.* ; whereas he should have stated that 50*l.* was taken for the forbearance, the remainder being the mere principal repaid. But it is very clear, on the whole statement on each count,

what is meant; for it is repeatedly said that 82*l.* was the money lent. The error is one of form merely, and not one that can affect the verdict.

SHERWOOD, J., agreed with the Chief Justice.

MACAULAY, J.—As to the exceptions, so far as they apply to the sufficiency of the proofs to support the matters of inducement, I do not think, especially after the evidence on the defence, that they can prevail. The evidence in chief supported the declaration in all material points; and if there was any laxity of proof as to the execution of the deed from Hill to the defendant, it was supplied on the defence, and the execution or existence of a sheriff's deed is not averred in the declaration. The verdict is general, and may be applied to any count which will support it under the evidence; and I am disposed to think the evidence sustains it under either the first or last count. The material question is, whether the defendant lent Hill 82*l.*, and for the loan and forbearance thereof, for three days, exacted and received 50*l.*

Then as to the sufficiency of the evidence to prove a loan on the day laid, which is said to be material, I am of opinion that as the sheriff accepted the cheque in payment—in short as money, between him and Hill, delivering Hill the deed of the land, thereby treating him as having paid and exonerating him absolutely—it must be taken, as between Hill and the defendant, that the money was lent and advanced at that time. The cheque was accepted as equivalent to the money. It was not incumbent upon the sheriff to have accepted it in payment; it was in his option to have required the money; but, as between him and Hill, he chose to receive it as cash, and under such circumstances, the allegation that the defendant did, on the day laid, lend and advance Hill 82*l.* as averred, is sustained by sufficient evidence. This disposes of the first, second, and fifth points. The remaining and principal question made at the argument arises out of the third and fourth. Upon consideration, I am of opinion that, under the finding of the jury upon the facts in evidence, this is a case of usury, although the defendant may have been ignorant of the legal

character and effect of the transaction—3 B. & P. 159, 161; 5 Moore, 588. It does not fall within that class of cases held not usurious by reason of the hazard of the principal, or of the principal and interest ; nor can it be divested of its obnoxious character upon the ground that there was no mutuality, no promise to pay the principal or interest at all events. I put out of consideration the argument that the proof fails, whether as respects matter of inducement, or, going to the gist of the action, from the want of written notes under the Statute of Frauds. Such objections would apply to suits to enforce such agreements, if valid, but do not affect proceedings like the present, in which parol evidence is equally admissible.—6 East. 602. Adverting to the statute under which the action is brought and to the facts themselves, I think it clear that the defendant did not absolutely agree to purchase, or Hill to sell, the land in question ; but that the defendant agreed to advance 8*l.*, which, with 50*l.* additional, Hill promised to return in three days. And in pursuance of such arrangement, it was further agreed, that to secure the whole sum of 132*l.*, the land should be pledged, conveyed by absolute deed, delivered either as an escrow or finally ; upon the verbal condition, however, that if the 132*l.* was not punctually paid the conveyance should become absolute, or be finally delivered, it being in the election of Hill to pay the 132*l.* or to relinquish the estate. The effect of this arrangement was, that for the forbearance of the 8*l.* the defendant was to receive 50*l.*, or else to obtain the land, worth 200*l.*, at 8*l.* There was no hazard of the 8*l.*; for if not returned in specie, it was secured by real estate far exceeding the amount in value. The defendant's deed was a mortgage, or a conveyance with a defeasible condition, or an escrow ; it was not an absolute independent conveyance of the land ; it was a pledge or security only. Hill could not evade payment of the principal, so as to deprive the defendant thereof. He could defeat the absolute vesting of the estate, by paying it ; but if he failed to pay, the defendant was nevertheless secured by an estate of much higher value. There was a penalty upon Hill : no hazard as to defendant. If Hill

failed to pay the 132*l.* at the day, he incurred the penalty of losing the land at 82*l.* In any event, from the value of the property, the defendant was secure. He was to have one of two things, viz., the 82*l.* and 50*l.* for the forbearance, or the land, worth a great deal more, at 82*l.*; and he received the former.

The circumstances offered in evidence tend to prove, and the jury have found, that the transaction was a contrivance to secure more than legal interest upon the advance of the 82*l.* It is by no means clear that Hill did not undertake, and would not under a valid bargain have been bound, to refund the principal at all events, if insisted upon by the defendant, were it in his power to have proved the arrangement by sufficient writing, under the Statute of Frauds. As it is, the bargain is tainted with usury. Had Hill failed to have paid the money at the day, he could have resisted or maintained an ejectment, on the ground of the invalidity of the conveyance to the defendant, being given to secure an usurious contract. There was not an absolute sale, followed by a contract for the re-purchase. There was a conditional sale, subject to be defeated by a specific payment at a specific day. It was contended at the trial, that the original purchase was enhanced 50*l.* If so, the sheriff should have recovered 132*l.*, instead of 82*l.* only; and at any rate the jury have found that such was not the true complexion of the transaction, but that the 50*l.* was exacted and received for the accommodation of the 82*l.*, and for the personal benefit of the defendant, if disposed so to appropriate the amount. The facts seem to me to warrant the conclusion drawn by the jury, and the verdict attaches the character of usury to the bargain. I am unable to perceive any satisfactory principle upon which I can say such verdict was wrong.

Per Cur.—Postea to the plaintiff.

CAVERLEY v. CAVERLEY.

Slander—office of an innuendo—inducement of prefatory matter—colloquium.

Case for slander.

The first count of the declaration (without any previous

special inducement) states that defendant, desiring to impute felony and larceny to the plaintiff, spoke the following words : "I know how he got the bond" (innuendo, meaning a certain bond from the said defendant to the plaintiff, for the payment of a certain sum of money.) "At the time we settled, I had my papers rolled up in that bond" (meaning the said bond) "on the table, and he stole it" (meaning the said bond). In the second count, the words were thus laid: "I know how he got the bond" (meaning a certain other bond for the payment of a certain sum of money by the said defendant to the said plaintiff, with a certain condition thereunder written). "At the time we settled, I had some papers rolled up in that bond, on the table, and he stole it." In the third count, thus : " I know how he got the bond" (meaning a certain other bond from the defendant to the plaintiff, for the payment of a certain other sum of money.) "At the time we settled, he (defendant) had some notes rolled up in that bond, on the table, and he stole it." In the fourth count, thus : " If he has the bond" (meaning a certain other bond from the defendant to the plaintiff, for a certain other sum of money), "he must have stolen it" (meaning that the plaintiff had stolen the same); "and I have lost two notes, and I expect he must have stolen them" (meaning that plaintiff had stolen the said two notes) "at the same time he got the bond." In the fifth count, thus : "I understand you have got that bond" (meaning a certain other bond from defendant to plaintiff, for the payment of a certain other sum of money). "When I got you to assist me in looking over my papers, I had the bond ; and if you have got the bond you stole it. I know very well how you got it. You stole it when you were looking over my papers."

Plea—The general issue.

At the trial no bond was produced ; but it appeared that, before the speaking of the words, the parties had some transactions together, and that the defendant had delivered and executed to the plaintiff a bond conditioned to secure the conveyance of some lands. At least, the only one spoken of and the one to which the imputed slander related, was of that description ; and it was insinuated, but not

proved, that the bond in question had, upon some subsequent arrangement, been delivered up to the defendant to be cancelled. After which the plaintiff clandestinely abstracted it, constituting the stealing of the bond, which the defendant attributed to him. The words proved were, "If he has the bond, he stole it when we settled," &c., and applied to the fourth and fifth counts.

On the defence, it was objected, 1st, that the declaration was bad in not shewing, by inducement or otherwise, that the bond alluded to by the defendant was an instrument of which a larceny could be committed, and that the innuendo, even if sufficient, cannot as attempted be allowed to extend and enlarge the sense, so as to supply the want of an inducement. 2ndly. That the words do not support the declaration.

Macaulay, J., before whom the cause was tried, thought the words proved applicable to the latter counts; but as to the sufficiency of the evidence to support the declaration in point of law, and as to the validity of the declaration itself, especially as respected the question of inducement to explain the subject matter and enable the plaintiff to apply the words used, he reserved the same, and told the jury that, if those who heard the words used understood that the defendant, when he spoke of the bond, meant in general terms a bond for the payment of money the property of the defendant, and designed to impute to the plaintiff the larceny of such an instrument, to find for him; but that if those hearing the words understood that the defendant alluded to a bond in which the defendant was obligor and the plaintiff was obligee, that had been finally delivered and afterwards been returned for cancellation, and subsequently abstracted fraudulently by the plaintiff, then to return a verdict for the defendant; as, in such event, the matter imputed would not constitute a larceny, indictable under the statute, for stealing a bond for the payment of money; and being understood by the auditors in the sense in which they were used, they would not be actionable, though couched in very general terms. The jury found for the plaintiff, and 25*l.* damages.

Bidwell, for the defendant, moved to set aside the verdict and enter a non-suit, on the objections taken at the trial.

Sullivan shewed cause—cited 3 D. & R. 521; 5 D. & R. 287.

ROBINSON, C. J.—I am of opinion that a verdict cannot be sustained for the plaintiff on this record. In every count, the meaning of the words is not merely made plain by reference to matters which are either evident or before stated, but it is extended, by declaring that the defendant meant a bond for the payment of money, though no colloquium is laid respecting any bond. This is going beyond the proper office of the innuendo. And then, when the plaintiff comes to trial with his cause, he proves that the defendant, in the words spoken, did not mean a bond for the payment of money, but a bond to secure the conveyance of land. This shews clearly the reason for confining the innuendo to its proper office. A mere innuendo is a thing in its nature requiring no proof; and therefore if nothing more than the innuendo were held to be requisite here, the plaintiff might recover, though the facts show that the slander was not of a character to support an action. But to make these words of stealing a bond actionable, it is necessary that it should be shewn they were spoken of such a bond as is the subject of larceny. The plaintiff was careful not to describe the bond properly in his colloquium, for then his statement would have negatived his right of action. But though he avoids stating it, he still feels it indispensable to prove it, and the proof destroys his cause of action; for the bond the defendant was talking of is shewn not to be a bond for the payment of money, but no other can be the subject of larceny. The statute 2 Geo. II. ch. 25, which first made it felony to steal bonds, speaks of such bonds only as are for the payment of money; and it makes the stealing of such bonds felony, in the same manner “as if the offender had stolen the money secured by the bond.” And besides, it is clear this plaintiff could not have committed larceny of a bond made by another person to himself (the plaintiff); and especially he could not be guilty of larceny in stealing it from the obligor, because such a

bond, in the hands of the obligor, could be of no value to him as a bond, under any possible circumstances.

In the famous case of Mary Phipoc (2 Leach, C. C.), nine of the judges expressly held that the offence (an alleged stealing of a promissory note) was not within the statute 2 Geo. II. ch. 25, which some said was only intended to protect existing available notes, &c., in the hands of the person from whom they were taken, and that this note did not come within that description, being of no value in the hands of the prosecutor.

SHERWOOD, J.—I am of the same opinion.

MACAULAY, J.—The principal questions seem to be, whether the declaration, on the fact of it, lays a sufficient cause of action; and secondly, if so, whether the evidence sustains it. The declaration all through represents that the defendant accused the plaintiff of stealing, not a bond, but the bond—some particular bond. But there is wanting a previous inducement, alleging a colloquium respecting a particular bond for the payment of money, which the plaintiff strives to supply by using the innuendo, to explain that the bond meant a bond from the defendant to the plaintiff (not from the plaintiff to defendant) for the payment of money, or with a condition unexplained. The declaration may therefore be invalid on the face of it, as wanting an inducement to shew what the defendant meant when he spoke of the bond. Then the evidence does not prove that the defendant accused the plaintiff of stealing a bond for the payment of money, or of stealing a bond at all, in the proper sense of the term; but that he, the plaintiff, had surreptitiously obtained possession of a bond conditioned to secure lands, which he, the defendant, had delivered to the plaintiff, and which he alleged was afterwards given up to be cancelled, and in reference to which instrument the defendant said, if the plaintiff had it, he had stolen it. This does not support the allegation that the defendant charged the plaintiff with having stolen a bond for the payment of money, as laid; and the words, as proved, do not appear to have been used in that general way that would naturally lead strangers, casually present and hearing them

to infer and understand that the defendant designed to impute to the plaintiff, in general unqualified terms, the crime of having stolen from him a bond for the payment of money, which, if true, would amount to a criminal offence, indictable under the statute.

Per Cur.—Rule absolute.

MCKENZIE V. BUSSELL.

An affidavit upon which an attachment was ordered, in which the debt sworn to was for money lent and advanced to the defendant, without saying by whom—*Held* defective, and the attachment set aside. An office copy of the affidavit, filed in the office of the Clerk of the Crown, at York, is sufficient to move upon.

Campbell, E. C., moved to set aside an attachment issued against defendant's property, under the Absconding Debtors' Act, upon two objections. 1st. That on the affidavit on which it was ordered, the debt is sworn to as for money lent and advanced to the defendant, without saying by whom; and 2ndly, that no addition of place of abode and occupation of the defendant is given in the affidavit, as required by a late rule of court. On shewing cause, *Spragge* took a preliminary objection, that the copy of the affidavit, which is expected to, is not so verified as that the court can notice it, being only certified by the Clerk of the Crown to be a copy, and not sworn to be a copy. The statute 2 Geo. IV. ch. 1, s. 34, extends only to the deputy offices; and *Spragge* argued that the principal clerk has no authority under it to certify copies of office papers, but, on the contrary, that the legislature, by giving that facility of proof in regard to papers filed in suits instituted in any district except the Home district, have by implication precluded it as to suits instituted in the Home district, because they have expressly excepted them.

ROBINSON, C. J.—We must determine this objection of the plaintiff's first. In England, I apprehend, an office copy, as this is, would be received for the purpose for which the defendant here desires to use it. Where office copies are evidence, and where it is necessary to have proved or sworn copies of papers filed, is largely discussed in Bac. Abr. Evidence F. Peake Ev. 31; and I take the principle

to be that, for the purposes of evidence generally, a copy of a paper or proceeding, certified by an officer, is only admissible when such officer is expressly intrusted by law to give out copies of such paper or proceedings; but where proof of the particular paper or proceeding is required "in the same cause and in the same county," office copies are equivalent to the record, and need not be proved.—Denn ex dem. Lucas v. Fulford, Burr 1179. The books of practice state this point consistently with the principle laid down in Burrows.—6 T. R. 319; Camp. N. P. C. 101; 2 Stark. N. P. C. 13; 1 Archb. Pr. 142; 1 Archb. Pl. 368; 1 Stark. Ev. 154.

I was inclined at one time to think that, whatever might be the case in England, our statute had the effect ascribed to it by the plaintiff, in consequence of its express exception of the Home district; but I am not now of that opinion. It would seem certainly, inconsistent that this court should be required to give credit to the signature and certificate of every deputy clerk of the crown, and at the same time be directed to refuse credit to their principal, who is the known and immediate officer of the court, acting under their view. That could not have been meant to be the effect of the statute 2 Geo. IV. ch. 1, s. 34. The language of that clause is, "that wherever the defendant or plaintiff thinks it necessary to produce to the court, not a sworn copy, but the writ, that is, the original writ, declaration, plea, or other proceeding, filed in any cause instituted in any district, except the Home district, a copy of such writ," &c., certified by the deputy clerk, shall be received by the court in all cases in lieu of the original and as a proof thereof. The expression, that the copy shall be received in lieu of the original, marks the intention of the legislature. They apprehended that occasions might arise for producing in court the original papers filed, as proceedings in a cause in an outer district; and that it might lead to the loss of the papers. They therefore dispensed with the production of the original, and allowed a copy to be used in lieu of it. I think, by that provision, they meant only to relieve from the necessity of bringing the original into court, and not to narrow the

admission of evidence in any case, by requiring other proof of proceedings, filed in the crown office here, than the law before made necessary. That would be enhancing the cost to suitors, for no good end. Besides wherever proof by an examined and sworn copy would be necessary, according to the general rules of law, it could as easily be transmitted in respect to a proceeding filed in the country, as if it were filed here; there is therefore no reason for supposing a distinction intended.

Considering this affidavit sufficiently before us for the purpose of the defendant's motion, it is to be decided, whether it is so irregular that the rule for setting aside the attachment should be made absolute. The first objection, I am of opinion, is fatal, and that the attachment must be therefore set aside. It has been decided in many cases, that in an affidavit to hold to bail, the omitting that the goods were sold or money paid, &c., by the plaintiff to the defendant, renders it bad for uncertainty; and we have held that the same certainty must be observed in these respects in affidavits made for suing out attachments. To allow any unlimited degree of uncertainty in them, would of course lead to abuse; and the only way to establish a proper and plain criterion, is to require the debt to be as certainly sworn to in the one case as in the other. In respect to the other objection, I am not disposed to give effect to it by holding this affidavit irregular, because it does not conform to affidavits to hold to bail in a matter of form only lately required by a positive rule of this court, which rule extends in terms only to the last mentioned affidavit, and ought not, I think, to be applied by construction to others.

SHERWOOD, J., agreed with the Chief Justice.

MACAULAY, J., agreed as to the sufficiency of the office copy. As to the objections to the affidavit: The rule of court requiring the addition of the defendant to be inserted, applies merely to affidavits to hold to bail, and need not necessarily be extended to affidavits of the present kind, though it may fall within the reason of the rule, and the object be indirectly to compel special bail. And no case

is produced to shew that the affidavit, in omitting to state by whom the money was lent, is insufficient even for the purposes of arrest. The object of the present affidavit was not to arrest the person, but to attach the goods ; there is therefore a difference, which may well be regarded upon applications of this kind. The strict rules laid down touching affidavits to hold to bail, are adopted in consequence of the loss of liberty to which the defendant is exposed. That reason does not apply here ; for although the object is two-fold—to secure the effects or enforce bail—still the defendant is not liable to arrest under the process, and need not enter bail unless desirous of appearing and contesting the claim. As applied to affidavits to hold to bail, there are cases which, although not in point, expressly seem to imply that it should be asserted that the goods or moneys were furnished to the defendant by the plaintiff, but these cases admit of a different view ; and as the plaintiff here asserts that the defendant is indebted to him in a specific sum, for money lent to him (defendant), it appears to me sufficiently positive and full. For if the plaintiff did not lend the money, the defendant could not be made indebted to him for money lent ; and if false, perjury might be assigned, upon the averment that the defendant was not indebted to the plaintiff for money lent to the former. The case of Ferguson v. Murphy, in this court, is important, and strongly in favour of the plaintiff on the present occasion. In the spirit of that decision (in which most of the cases in the books, bearing upon this point, were reviewed) the objection made may be rejected as not tenable. Upon comparing the cases in the margin with those in which, in an affidavit for goods sold, the delivery must be asserted to have been made by the plaintiff, I feel warranted and am disposed to uphold the plaintiff's proceedings in this case, and I think therefore the rule should be discharged.—Taylor's R., 271 ; 8 T. R. 338 ; 7 Ea. 94 ; 3 M. & S. 178 ; 1 Marsh. 316 ; 5 Taunt. 756 ; 6 Taunt. 389.

Per Cur.—Rule absolute.

MACAULAY, J., *dissentiente*.

RUGGLES V. BEIKIE.

Where lands have been sold by a sheriff under a *f. fa.* upon a judgment against an executor or administrator, the heir at law is entitled to recover the surplus from the sheriff.

Debt. The first count of the declaration stated that one John Gray, in Trinity Term, 44 Geo. III., recovered judgment against James Ruggles, of whom plaintiff is eldest son and heir at law, for 103*l.* 4*s.* 9*d.* damages and costs in assumpsit. That on the 8th October, 1804, James Ruggles died intestate, and in Michaelmas Term, 50 Geo. III. judgment in *sci. fa.* was given for the said John Gray, against the said Esther Ruggles, as administratrix of James Ruggles. That on 13th January, 1810, the said John Gray sued out a *f. fa.* to the sheriff of the Home district, commanding him to levy of the lands, &c., which were of James Ruggles, deceased, in the hands of Esther Ruggles, administratrix of the goods and chattels of the said James Ruggles, returnable the last day of Trinity Term, 1811, indorsed to levy 22*l.* 9*s.* 1*d.*, with execution, sheriff's fees, poundage, &c., which writ was delivered to Miles McDonell, then sheriff, to be executed. That on the 2nd May, 1810, Miles McDonell, Esq., ceased to be sheriff, and the defendant, Beikie, succeeded and continued to be sheriff until at and after the return of the writ. That defendant, on the said 2nd May, 1810, being sheriff, took in execution divers lands of James Ruggles; and afterwards, on 1st March, 1811, sold the lands under the said writ for 171*l.*, and levied and received a sum, over and above the sum endorsed, as above mentioned, 144*l.* 13*s.* 1*d.* That on 3rd July, 1830, plaintiff demanded from defendant the said 144*l.* 13*s.* 1*d.*, but defendant refused to pay it.

Common counts for money lent—paid—had and received—and for interest.

Pleas : *nil debit* to the whole declaration. To the first count, *actio non accrevit infra sex annos*; and a similar plea to the other counts. General demurrer to the plea of the Statute of Limitations to the first count, and issue on the other plea.

The cause was tried at the last assizes for the Home

district, before the Chief Justice, and contingent damages assessed on the demurrer. A verdict on the issues was rendered for the plaintiffs, subject to the opinion of the court upon the sufficiency of the evidence to sustain the action. Both the demurrer and the objections raised upon the evidence were argued at the same time, by *Draper* for the plaintiff and *Sullivan* for the defendant. The facts of the case will be found in the report of Ruggles v. Beikie, 2nd MS. Rep., vol. 2, U. C. R., (O. S.) 370.

ROBINSON, C. J.—In the first place as to the plaintiff's demurrer to the plea of the Statute of Limitations to the first count, it seemed not to be attempted to support the plea on the argument; and we assume it to have been considered that the statute would be no bar to the cause of action stated in the first count. When an action between these same parties, and for this same cause, was before us in another shape, a majority of the court were not inclined to think that the statute could be pleaded even to an action of assumpsit brought against the sheriff under such circumstances; but the cause went off upon another objection—the want of a demand made upon the sheriff before bringing the action, by the party entitled to the surplus of the money levied. This action is brought, averring such a demand; and independent of the ground that the demand was not made till within six years, and that the limitation does not begin to run till the cause of action is complete by the making the demand, it seems clear that debt against the sheriff for money returned to be levied on a *fi. fa.* is not barred by the statute.—7 Ves. 319; 6 Ves. 26; 1 Mod. 245; 2 Mod. 212.

The pleadings, however, being laid open by this demurrer, the defendant objects that the declaration is insufficient. 1st. Because it does not shew that the deceased, Ruggles, died seized of an estate of inheritance in the lands sold, such as would descend to his heir; the words lands and tenements not necessarily extending to an estate of inheritance. The plaintiff being cognisant of the estate his father had, should have averred expressly of what estate he was seized, according to the general principles of pleading.

2ndly. Because the authority given, in the writ to levy of the lands and tenements which were of James Ruggles, deceased, in the hands of Esther Ruggles, administratrix, &c., must necessarily have restrained the sheriff to levy upon leasehold property upon which the plaintiff had no claim, since an estate of freehold would not have been in the hands of the administratrix, and could not therefore have been taken under this writ. 3rdly. Because the declaration does not shew a legal right in the defendant, as sheriff, to sell these lands ; and although he has sold them in fact, still, if he did it illegally, he holds the money for the purchaser, to whom he has sold an estate without title, and not for the person who must still own the estate. 4thly. Because it is not averred that the defendant had notice that the plaintiff is the heir of Ruggles, deceased. 5thly. That the surplus ought to go to the administrators, rather than the heir ; and that at any rate if the heir can make good a claim to it, it can only be in a court of equity and not in an action at law.

In the first objection there is certainly nothing ; the rule is the other way. The words lands and tenements, unexplained, imply property held in fee, and not leasehold.—*Rose v. Bartlett, Cro. Car. 292.*

Upon the second point, it is clear the execution was not intended to be against chattels ; because it is specifically against lands and tenements, which we know never to be included in a *fi. fa.* against goods, and which our statute 43 Geo. III. ch. 1, positively declares shall not be included in the same writ with goods. The period of the return of the writ shows also what was intended ; and the words "in the hands of the administratrix," if inapplicable and improper to be used in the case of real estate of a deceased debtor, must, I think, be rejected as insignificant. If, on the other hand, they are not improper to be used in such a case, having reference to the effect of the British statute 5 Geo. II. ch. 7, then of course the objection now urged does not apply.

Upon the third point : I am of opinion, that it cannot lie in the mouth of the sheriff to object that his own acts were

void. For all that appears upon this trial, the purchaser has enjoyed the estate under the conveyance made to him by the sheriff, and the sheriff had no claim made upon him by the purchaser, upon the pretence that the sale was void. I speak of course only with reference to what appears on this record, and to what was in evidence upon this trial; and surely the sheriff cannot be admitted to hold a large balance of money in his hands, upon the surmise that he believes all he did was illegal, while those whose rights were affected are willing to acquiesce and treat it as being legal.

Upon the fourth point—this objection is raised on general demurrer. Supposing the heir to be entitled to the surplus, the sheriff holds it for his benefit; and it is expressly averred that he demanded the money, and the sheriff refused to pay it. The demand involves and implies notice, and the refusal to pay to the right claimant, when he demands it, is made at the peril of the party. By claiming the money, he must be taken to have announced himself to be the heir. When a demand is necessary to sustain trover or ejectment, the person making it need not shew that he entered into a formal deduction of his title; it is enough if, being entitled, he made the demand.

The fifth point made is the most important, and doubtless that which has been most relied upon. But it scarcely remains a question in this court, after the opinions we have had occasion to express in other stages of this cause, and after the judgment given in the case of *Gardner v. Gardner*, upon the best consideration we could give to the operation and effect of the statute 5 Geo. II.

That judgment, so long as it remains unappealed from, must be taken by us to have settled the principal question involved in this case, namely, whether real estate in this colony can be legally sold in execution upon a judgment obtained against an executor or administrator of a deceased debtor.

After much doubt, and several contradictory decisions among the different judges who have presided here, it was decided, in *Gardner v. Gardner*, by a majority of this court,

that real estate is liable to be sold upon such execution ; and that point we now treat as settled. It is satisfactory to me to say, that the view taken by us of that statute appears to have the sanction of the late master of the rolls, Sir Thomas Plumer, according to the note of a case reported in 1st Russell's Ch. Pr. 540, and referred to in the late Treatise on the Law of Evidence, by Mr. Williams, p. 1017. Sir T. Plumer, indeed, seems to have ascribed a more extensive operation to the statute than is necessary to support our judgment in *Gardner v. Gardner*, for he says "that by the act of Geo. II. plantations in Jamaica are converted, with respect to the payment of debts, into personal assets, and as such are possessed by the executor." "They are personal assets," he adds, "and in all respects to be administered as such." The case in which this opinion is expressed is *Thompson v. Grant*.

I am further strengthened in the conclusion we came to upon reading, in the Lords' Journals for 1828, the petition upon which parliament proceeded in passing the declaratory act to which I alluded in *Gardner v. Gardner*, and which in positive terms declares that real estate is liable in India to be sold under execution against the personal representatives of a deceased debtor. Not that that statute, or any statements which led to it, can involve specifically the construction of the statute 5 Geo. II. ch. 7, because that applies exclusively to American colonies, but because the state of the law on this point, as it had always been administered in India, and as it is now confirmed by that statute, is precisely such as we were told in argument no lawyer could have contemplated or intended, though we held it to be that to which the language of the statute evidently led. Then taking it to be settled that the estate of Ruggles was rightly sold upon a *fl. fa.* against his administrator, the question here presents itself, who shall be allowed to claim the surplus arising from the sale, after the debt is satisfied ? Upon this point also our opinion has in effect been already expressed, and I will only say shortly that we are all of opinion that the heir is entitled to the surplus. This surplus merely represents so much land. If the sheriff had sold

but a small part only of the land (which is the course he ought to have taken), to satisfy the trifling debt which he was commanded to levy, unquestionably the remainder of the land would have remained vested in the heir, liable of course to the remedy of creditors, if other debts existed. So here we think he is entitled to the money. No other claim appears. If there were other debts due by Ruggles there were five years in which they might have been sued for, between his death and the obtaining judgment by the creditor whose debt was the foundation of the sale, and since that time twenty-four years more have elapsed, so that in the nature of things we can scarcely suppose that there is any debt for which the administratrix remains liable; and the right of the heir is not to be met by mere surmise of a stranger, that possibly some debt may be due. On the trial of this cause, it was shewn that, two or three years ago, the administratrix accompanied the heir, when he demanded the money of the sheriff; and so far from setting up any claim in opposition to the heir, she desired it might be paid to him, and offered to join the heir in giving an indemnity to the sheriff.

As this question rises out of the statute 5 Geo. II., which is peculiar to the colonies, we cannot expect to find express authorities upon it in English decisions; but I refer to several cases, as involving the reasons upon which I consider the plaintiff's claim to be supported.—2 Plow. 415; 1 Lev. 224; 1 Atk. 420; Hob. 265; 2 Ves. 106, 405; 2 Br. Ch. Ca. 595; 3 Plow. 22; 1 Br. Ch. Ca. 497, 513-4. It is clear from these authorities, that where lands are devised to executors, or to other persons as trustees, for the payment of debts, the surplus not required to pay debts is in their hands as a resulting trust for the heir. This remedy, it is true, must be sought in equity, because the trustees are legally in possession of the property, accountable upon the principle of trusts in equity only. But here the real estate, when the intestate died, devolved upon the heir. It was not assets unless there were debts, and only assets so far as the debts required. The residue is not now, in fact, in the hands of the administratrix, but of the sheriff, and the

administratrix neither sets up a claim, nor can have any, but upon shewing a debt. We certainly are not called upon to presume debts, and more especially at this distance of time. If there are debts, the heir is responsible in equity.
—Yelv. 196.

SHERWOOD, J., agreed with the Chief Justice, referring to his opinion already given in this case.

MACAULAY, J.—With respect to such exceptions as were obviated by the evidence at the trial and cured by verdict, I am at present of opinion, they cannot be urged at this stage of the proceedings; such as, that the plaintiff did not inherit—was not seised in fee—that the land sold was not descendible or inheritable estate, and that the defendant was not apprised in what capacity and by what right the plaintiff demanded the surplus in controversy.

But under the decisions that have taken place in this court already, I conceive that the writ in question must be understood to have issued under the 5 Geo. II. c. 7, against the real estate descendible of the deceased Ruggles, and not against leaseholds for years, which must have been included in the ordinary writ against goods and chattels in hand, all of which it must be presumed had been previously exhausted; at least, it must be presumed that a writ, intended to operate against such estate, would be couched in the usual terms of process against the ordinary assets in hand. The real estate is not properly, perhaps, assets in hand, though for the purpose of satisfying a judgment, as assets, under the 5 Geo. II., it is usual to denominate lands in fee simple as assets in hand, or rather as lands in hand. Again the writ was against all the lands and tenements which were of the deceased at the time of his death—terms sufficiently comprehensive to embrace fee simple estate. Under a devise in such terms of land to be sold for payment of debts, lands held in fee would be clearly comprehended. The lands to be sold are referred to as being in the hands of the administratrix, to be administered; and if not so in point of fact, it does not follow that they may not so be regarded in law, so far as the executor or administrator forms the medium of sale. It is unnecessary to decide

at present whether real estate can be administered as ordinary assets in hand, in favor of creditors, except through legal process; but when legal process is resorted to, sufficient to warrant and sustain a sale in all other respects, such execution, even if it erroneously stated the lands to be assets in hand to be administered, would not necessarily be void. The redundant passage might be rejected as surplusage. Then assets *quoad* the execution may, if necessary, be treated as *quasi* assets in hand *pro forma*, at least such I take to be the effect of former decisions. Should it not be necessary to describe real estate as in hand, then it would form surplusage, and might be expunged.

The writ appears to have been delivered to a former sheriff, and, upon his relinquishing the office, to have been transferred to the defendant, he having succeeded to the appointment. It does not appear the former sheriff had previously commenced its execution, and I am not aware of any law disabling the succeeding sheriff from receiving and executing such process under such circumstances. The declaration asserts, that the defendant seized and took in execution and sold and disposed of divers lands and tenements, which were of the deceased at the time of his death, which must, I think, be intended to consist of lands which were his in fee simple. The terms are sufficiently comprehensive to include fee simple estate, and there is nothing to induce the presumption that any less interest was enjoyed therein by the debtor or contemplated by the process. *Prima facie* it must be presumed, the lands proceeded against had been held in fee, in the absence of any thing to indicate the contrary. The plaintiff is described as heir at law of the deceased, and entitled to sue for the surplus—not as such heir—but being such heir, that he acquired the estate by inheritance, and became so entitled in his own right as legal owner of the lands sold under the prior incumbrance.

Upon the whole, I am of opinion that the plaintiff is entitled to recover, if an heir-at-law can maintain assumpsit for the surplus arising from the sale of lands descended, the same being sold upon a judgment against the ancestor,

executor or administrator, without averring a previous entry so as to shew seizin in law and in fact, as the owner of the estate at the period of such sale. This is a general question ; and the present seems to resolve itself into a case falling within the rule that must govern it.

It is fully established that, in England, the proceeds of lands sold by executors, under devisees for payment of debts, constitute equitable assets ; but the statute 5 Geo. II. declares the land itself in the colonies to be assets, and subject to sale in courts of either law or equity, in like manner as personal estate,—1 B. & C. 364; 2 D. & R. 539; 9 B. & C. 489. The land therefore is *quasi* legal personal assets. If the heir or devisee can claim the surplus after sale resort to equity may become necessary to render him responsible to unsatisfied creditors. So that the surplus after a sale under an execution may perhaps be regarded as equitable assets, as respects the remedy against the heir or devisee ; but at law it would form money had and received to the use of the owner of the land sold. The legal owner may sue at law, and no one else can.—2 Preston on Abstr. 297. An entry by the heir does not seem essential, because the lands may have been sold before entry, and possession taken by the vendee of the sheriff, after which the heir could not enter, nor could any one else, as under the ancestor ; and if the heir, at the time of the sale, could not recover the surplus, it is clear no one else could, and the sheriff might retain it for ever. Besides, the demand upon the sheriff is the only act or assertion of ownership within his power after a sale ; and if an entry could not be presumed, its proof might well be dispensed with. This kind of action lies at the suit of an executor or administrator, for the surplus of personal assets sold under similar circumstances, and I see no good reason why the same rule should not extend to the heir-at-law. Were lands subjected to sale by a legal proceeding against the heir, as heir or term-tenant, in that case he might demand at law the surplus accruing from the sale of his own property : and as his legal rights remain uninfringed in all points, except as respects the power of a creditor to sell the lands to satisfy

a judgment debt, it seems to follow that he may sue for the surplus in a court of law, when the proceedings against the estate are at law, or in equity when a court of equity is resorted to, to enforce the sale.

The creditor may resort to courts of law or equity to enforce his remedy, and so may the heir-at-law, to obtain the surplus remaining in the sheriff's hands. This surplus, when so recovered, would, in the hands of the heir, be personal estate, as between himself and his creditors or representatives ; but as respects creditors of the ancestor, it would in equity be regarded as lands or real estate descended, and as such be liable to the satisfaction of the debts. Because the heir may recover at law by a course of proceeding which adopts and approves the sale, it does not follow that he could not obtain redress in equity ; though I am not prepared to say that he could exercise any such alternative when the sale takes place through a court of law. The statute 5 Geo. II. is anomalous in itself ; and in its construction and application, I do not perceive that the English decisions respecting assets, as real or personal, legal or equitable, can be altogether adopted or followed, but cases arising under it must be determined on their own principles and circumstances, according to the nature of the subject and the courts of law or equity in which the proceedings may arise or be conducted. At law, the surplus constitutes personalty belonging to the owner of the land ; in equity, such surplus would, in favour of creditors, be treated as land still, and as such tangible in his hands. The legal owner may, and he alone can, sue at law. Other parties, entitled to equities, must seek the aid of equitable tribunals.

Per Cur.—Postea to the plaintiff.

McCOLLUM v. CHURCH.

Assumpsit upon a promissory note transferred by the payee to the plaintiff after it became due. On non-assumpsit, the defence set up was, that the defendant and the payee had a settlement, when defendant agreed to convey a lot of land within six months, to give over certain stock, and to give the note now sued upon, the payee agreeing to deliver up to defendant certain promissory notes, according to a schedule. Defendant delivered the stock, gave his note, and

mutual receipts were exchanged. Defendant then accompanied payee to his house, in order to get the promissory notes in the schedule ; but payee had only a part, which defendant refused to accept, unless the whole were delivered up to him. It did not appear that the land had since been conveyed, nor what amount of the promissory notes was deficient ; but at the trial, the jury found that payee, at the time of the settlement, concealed from the defendant that he had not all the promissory notes in the schedule in his possession. *Held*, that the defendant could urge these facts as a defence to this action on his note.

Assumpsit brought by the plaintiff upon a promissory note for 50*l.*, made by the defendant on 26th August, 1831, payable to one Henry Lasher, or bearer, one year after date, with interest, and received by the plaintiff *after* it became due. It appeared at the trial, that the defendant was executor to the estate of one Pruyn ; that Lasher was a creditor of that estate ; and that on the 21st April, 1828, a number of promissory notes, belonging to such estate, had been by the defendant placed in his hands, of which a schedule was produced, headed as follows : "Inventory of sundry notes of hand received from John Church, Esquire, executor of the estate of the late William Pruyn, as part payment of my demand against said estate"—amounting together to 30*l.*. 19*s.* 4*d.*; dated Bath, 21st April, 1828, and signed "Henry Lasher." The last in the list was a note for 200*l.* It was said these notes had been merely entrusted to Lasher to enable the defendant to assert a want of assets, if called upon by other creditors of the estate ; but in the arrangement hereafter noticed, they were treated as having been placed in his hands, not absolutely in part payment, as expressed in the receipt, but to collect, on condition that all sums obtained upon them should be credited to the estate, and that the notes proving unproductive should be restored.

On the 24th March, 1829, Lasher rendered an account against the estate of Pruyn, including interest to that time from 24th May, 1828, containing some credits for moneys collected by him from persons indebted thereto, but not including any of the notes mentioned in the schedule, except the *last*. This account exhibited a balance, due Lasher, of 142*l.* On the 26th August, 1831, a settlement of this account took place at the former residence of Pruyn, near Bath, at which latter place Lasher lived. On the defendant's part, it was agreed to give Lasher the note now

in suit, equal to 50*l.*, that a lot of land should be conveyed to him by Mrs. Pruyn, within six months, valued at 50*l.*, and that farming stock should be immediately delivered, to the appraised value of 42*l.*

The stock was accordingly delivered, and the present note given. Lasher, on his part, agreed, in consideration of the foregoing, to sign a receipt in full for his account of 142*l.*, and to deliver up to the defendant all the notes embraced in the schedule (which were called old notes) except the last, for 200*l.*, the aggregate amount being 102*l.* 19*s.* 4*d.*; and he accordingly delivered to the defendant a receipt, dated 26th August, 1831, "for 142*l.*, in full discharge of all demands against defendant, and also against the estate of Pruyn, when he should have received a deed from Mrs. Pruyn, for lot 142, 7th concession, Camden, valued at 50*l.*, the transfer deed to be delivered to him, or in his name, within six months from the above date." The defendant, at the same time, delivered to Lasher a receipt for 5*s.* in full of all demands. The old notes to be returned by Lasher were represented as being at his house in Bath, and consequently could not be immediately delivered over; and it seemed that many of them were regarded as bad or doubtful, and the whole of no great value, though purporting to secure 100*l.* and upwards. However, on the day of this arrangement, the defendant, accompanied by a witness, went, at Lasher's request, to his house, and demanded these securities, when he produced a number of them (amount unknown), but not all those specified in the schedule, exclusive of the last for 200*l.* The defendant insisted that he was to receive the whole, by the terms of the settlement, and that without all of them he would not accept any. Lasher asserted that he had promised to give back such only as he continued still to hold, and not all those embraced in the schedule, excepting that for 200*l.* This was denied by the defendant, who withdrew, leaving all such as had been produced by Lasher in his possession. It was attempted, at the trial, to account for the deficient notes by alleging that Lasher received no allowance of interest upon his account, from the 24th March, 1829 to

the 26th August, 1831, seventeen months; and that any sums received on the old notes and not brought into account, were to be regarded as equivalent to or accepted in lieu of such interest. Lasher being examined as a witness, said that the defendant, when in treaty for the sale of the land, said that the Pruyn notes were of little or no value; that the note in suit was transferred to the plaintiff in November preceding, and that on demanding payment from the defendant, after it became due, he told him (Lasher) he would not pay it till he gave up all the notes in the schedule, except that for 200*l.* The defence relied upon in this action (recently brought) was that the note in question, being taken by the plaintiff after it arrived at maturity, it was open to the defendant to urge against it any defence that would be available had it remained in the hands of the original payee; and that inasmuch as Lasher had knowingly and falsely represented, at the time of the settlement, that he then had in his custody *all* the notes contained in the schedule, exclusive of the last, and had promised to restore the same to the defendant, while in truth and in fact he then possessed a part only, and had given no credit for those collected or deficient, he had practised a deceit and fraud upon the defendant. That the restoration of these notes formed a portion of the consideration, on Lasher's part, for which the note and stock were given and the land agreed to be conveyed; that such part of the consideration to move from Lasher, was owing to his wilful misrepresentation, tainted with fraud, and thereby the agreement vitiated, and a valid defence afforded against the present demand. Nothing was said as to the legal consequences of that part of the agreement which related to a contract or sale of lands, not being evidenced by a note or memorandum in writing, according to the Statute of Frauds. And it did not appear whether Mrs. Pruyn had conveyed the same to Lasher, or not. The jury, under the direction of Macaulay, J., who tried the cause, found for the plaintiff for the amount and interest; and at the desire of the learned judge, with a view to the present application, they also found that Lasher had agreed to give up *all* the notes except the one

for 200*l.*, and not merely such as might remain in his hands, he representing to the defendant, at the time of the settlement, that he retained all of them, and concealing the fact that of some, not credited to the estate of Pruyn, he had disposed or received payment.

McKenzie, for the defendant, moved in last term to set aside the verdict, on the ground that the facts in evidence should have been left to the jury, as proving fraud and deceit sufficient, if true, to constitute a bar to this action.

Bidwell shewed cause. *Cur. adv. vult.*

ROBINSON, C. J.—The evidence given at the trial, leaves us imperfectly informed on one or two points that ought to have been more precisely made out. I should like to know whether the executor, after he discovered the untruth of the statement made to him in respect to the notes, did nevertheless convey the land, or cause it to be conveyed, to Lasher; and it would also be desirable to know whether the amount which Lasher had received on these notes exceeded the amount of the note declared on. Upon either of these points, we have no sufficient grounds for assuming one way or the other, and must consider the case as if nothing were proved in regard to them.

The first consideration that arises is, that this action is not brought by Lasher, the original payee, whose fraud is complained of, but by a third person, as bearer of the note, who, for all that appears, took it innocently, paying its value. I take it, however, to be now well settled that that does not vary the case, where the note has been transferred after it became due, as it was here; for though some earlier cases laid down the rule in a measure somewhat qualified, and though a case of *Morris v. Lee*, referred to in *Bayley on Bills*, 398, is difficult to be reconciled with the rule at all, it seems to be now held, upon many authorities, that the holder of a note or bill, who took it when it was over due, stands in the situation of the person who was holder at the time it became due, and it is on the credit of such person that he is considered to have taken it; and consequently, whatever defence could have been urged against the paying it to Lasher, could equally be urged now that it

is sued upon by McCollum. And, indeed, if it were still held, as it once was, that some slight ground must be laid for supposing a knowledge of the fraud by the party taking the note, the jury here might not have had much difficulty with that part of the case ; for it seems that this note was transferred by Lasher to his brother-in-law long after the difficulty arose about the notes, and it is not very improbable that it was so transferred under the idea that a third person would stand on better ground in an action than Lasher, after what had occurred. But, as the law seems now to be settled, it is unnecessary to inquire whether the plaintiff had or had not any knowledge of the alleged fraud. We are to take it as if the action had been brought by Lasher himself ; and looking at the defence in this light, I agree with the defendant's counsel, that it will not do to rest an objection to the plaintiff's recovery on the ground of a partial failure of consideration merely. There is indeed a class of cases which would seem to authorise the recovery of a less sum than the face of the bill, upon proof of a failure of an ascertained and specific part of the consideration, or rather of the want of consideration to an ascertained amount.—Peake, N. P. C. 61. But there is nothing ascertained here as to the amount of the notes which the defendant believed to be in existence, in consequence of Mr. Lasher's misstatement ; and therefore there was nothing to warrant a verdict for any certain sum less than that claimed. The defence, therefore, must be considered on the ground of fraud in obtaining the note ; and the first question that arises is, was there fraud in the facts found ? I think clearly that there was ; for if Lasher, having the list of notes in his hand, asserted to Church that, except the 200*l.* note, all the rest were in his hands unpaid, and ready to be returned to Church, he made an assertion as to a fact peculiarly within his own knowledge ; and when it turns out that a part of the notes had been certainly paid to *him* and given up to the parties, the reasonable presumption is that he intended to deceive. That presumption might be rebutted by shewing that he was led by want of memory, or by some misconception, into an accidental misstatement ;

but when Church went to him, immediately after the settlement, to demand the notes specified in the schedule, he did not pretend that he had forgotten the true state of things in regard to the notes; on the contrary, while he declared that he had only a part of them, he declared also that he had only undertaken to restore a part, and that he had made Church aware, at the settlement, that the others had been paid and given up. Now in saying this, which is not consistent with other evidence given to the jury of what did pass at the settlement, Lasher either spoke truly or untruly. The jury, after hearing both the subscribing witnesses to the note, and Lasher himself, said that in their opinion he spoke untruly; and if so, the inference is almost inevitable that his misstatement as to the notes was deliberately and intentionally made, because he is found endeavouring to support his case by further misrepresentations.

Then assuming, as the jury have found, that he did knowingly misrepresent falsely to Church that certain notes remained unpaid and available to the estate, which he had himself received and not accounted for, it was certainly a fraud, and fraud of the most direct and positive kind—*6 T. R. 264.* It was both *suppressio veri et suggestio falsi*. It was what Lord Hardwick called “*actual* fraud, arising from facts and circumstances of imposition,” as distinguished from fraud apparent in the terms of a contract, or to be inferred from circumstances and the condition of the parties.—*2 Vez. 155.* I think also we are bound to admit that this imposition was such as to affect directly the consideration of the note sued upon in this action; for it was only by assuming that Lasher had received no part of the notes specified in the schedule, except the one for 200*l.*, that the estate was admitted by Church to owe him 142*l.* What he had received was known to him, and was not known to Church; and a confidence was to be reposed in the statements of Lasher, from the nature of the transaction, unlike some other cases, in which common prudence exercised at the moment could guard the party from being deceived. Believing this statement, and acting *bona fide*, Church admitted himself to be indebted, as executor of

Pruyn, in the sum of 142*l.*, to Lasher, and arranged it as we have seen. Now, if in fact he had received 40*l.*, or 50*l.*, or more or less, than he had said nothing of at the settlement, he imposed on Church to that amount. The stock Lasher got : we are not certainly informed whether he got the land or not, but we cannot assume both that he did not, and that the amount of notes that he had received and not accounted for would not exceed the value of the land, and so leave the note still fairly due, without assuming what is not proved to us, and thus incur the risk of suffering the imposition to be wholly or in part successful.

On an examination of the cases, I consider clearly that fraud in obtaining a note is a good defence against the payee. That indeed no one can doubt ; and I also think that although a partial failure of consideration, as in the case cited of Ryan v. Richardson, 1. Camp. 41, will not of itself defeat the recovery, yet that fraud in obtaining the note, although it may only extend to part of the consideration, will constitute a defence to an action on the note, by vitiating the whole contract and avoiding the security. This seems to be clearly deducible from what is said by Lord Ellenborough, in the case of Fleming v. Simpson ; and from the cases of Ledger v. Ewer, Peake, N. P. C. 216 ; Solomon v. Turner, 1 Stark, N. P. C. 51 ; Lewis v. Cosgrave, 2 Taunt. 2 ; and Robison v. Bland, 2 Burr. 1082.

It remains then to consider whether any thing has taken place, in this case, which precludes the party from urging this defence. It was urged, that the settlement having been carried to a certain extent into effect, the parties cannot be placed in *statu quo*, and that the contract cannot be wholly rescinded ; and it is contended that the contract being entire, cannot be rescinded in part and allowed to stand for the remainder.

Upon this point there are cases which at first seem inconsistent, and some of them perhaps are not easy to be reconciled ; but I think the principles to be extracted from all are consistent with reason and justice, though it may be difficult to find express authority for their exact application to the circumstances of a particular case. It would in my

opinion be an entire misapplication of the principles to be derived from any case which I have met with, to contend that because Church, before he discovered the fraud, had delivered stock in part payment of the debt of 142*l.*, he is prevented by that from resisting the performance of what remains to be done on his part. That would be to establish this unjust and absurd doctrine, that because he has ignorantly been imposed upon to a certain extent, he must submit to be imposed upon to the full extent, and as to all parts of the contract. As to the stock, the probability is that he could not be placed in *statu quo*; but that is surely no reason why he is to submit to additional loss and injustice. He could not affirm the contract in part by taking advantage of any of its terms after knowledge of the imposition, and then raise an objection on the round of fraud, because he must act consistently, and not adopt or repudiate at his pleasure. So also if, before he knew of the imposition, he had enjoyed some benefit under the contract, such as would prevent the parties being placed in *statu quo*, the contract could not in fact be rescinded totally, and it would therefore become a question whether the defendant must not be left to his remedy by an action for the deceit.

If it had been proved here that Church, after learning the truth, had conveyed the land, I am not prepared to say how that should affect the right of urging fraud, as a defence to the note, or how far that question might be affected by more certain information of the amount received by Lasher on the notes. We need not discuss these points at present. I think the having delivered the stock in ignorance of the imposition which had been practiced, does not by any means prevent the defendant's resisting payment of the note. And then it seems to me, we have only to consider whether anything depends upon the mutual receipts proved to have been given. I assume that Church still holds Lasher's receipt in full, not having tendered it back, and not having been called upon to do so, but contenting himself with refusing to take any of the notes when he found the deficiency, and giving this prompt notification that he repudiates the settlement. One must be guided by reason in

determining what effect should be given to this. In *Fielder v. Stacker*, 1 H. Bl. 19, Lord Loughborough says, "No length of time will alter the nature of a contract originally false, neither is notice necessary to be given. If a sale be fraudulent on the part of the seller, he will be liable to the buyer in damages, *without either a return or notice.*" I find no authority for saying that the defendant was bound, after detecting the fraud and objecting to it, to take back the receipt to Lasher. If he had refused to deliver it on demand, he would, by the refusal, have shewn that he desired to adhere to the settlement, so far as it applied in his favour, and he could not do that and at the same time repudiate the settlement as fraudulent. But he has not done this; the receipt has merely rested in his hands; he has not advanced it or used it for any purpose. It could only be of use in one way, by protecting him against any further claim of Lasher's; but he rendered it of no avail to himself for that purpose, by the very act of rejecting the settlement and defending this action upon the grounds that it was false and inconclusive. A receipt may always be controverted; and it is impossible to suppose that, after succeeding in this defence against the note, the defendant could ever again advance that receipt. In the mean time, its resting with Church has neither yielded him an advantage nor done Lasher an injury, so as to bring the case within the objection that they cannot be placed in *statu quo*.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—It is my misfortune to differ in some degree from the majority of the court, as well in the principles of law which should govern this case as in the application of the facts to those principles. In some preliminary points, however, I fully concur. I concur in thinking that the conduct of Lasher was fraudulent, in falsely representing that he continued in possession of all the notes received by him on account of Pruyn's estate, and promising to restore them to the defendant, when in fact he had, as he well knew, parted with or obtained payment of some not credited to that estate, and of which the defendant was not apprized. I think also that the restoration of the notes

formed a part of the consideration to be performed by Lasher; for if credit had been given for any portion of those notes, the account of 142*l.* would have been reduced to such extent, unless it fell short of the *interest thereon*, from the 24th March, 1829; a fact, however, which did not appear; all remained in uncertainty. The contract or settlement, though consisting of several or distinct acts, was in itself entire. The defendant was to give stock, 42*l.*, land, 50*l.*, and this note 50*l.*, equalling 142*l.*, on the one side; and Lasher was to acquit the account and deliver up the old notes, on the other. And being entire, that portion of the consideration on Lasher's part, which related to the return of the old notes, pervaded the whole consideration on the other side, and applied in an undefined and uncertain degree to the stock, the land, and the note in suit. As respects the note more immediately, it may be strictly said that the consideration upon which it was given, so far as it related to the old notes, was Lasher's promise to restore them, rather than a performance by actual restoration, the latter not forming a condition precedent or dependent; the note having been given absolutely upon the *promise*, before the time at which (as the circumstances evince) *performance* could take place. But whichever constituted the consideration, the fraud equally affected it.—8 T. R. 273; Chitty on Contr. 273. A promise to do that which the party falsely asserted it was in his power to do, knowing that it was not so in his power, with an intent to dupe and mislead the opposite party in matter of material and beneficial interest, is fraudulent. I am further of opinion that, however the contract may itself be devisable, the *security* is *entire*; that when a security is given for the stipulated price of goods sold *bona fide* and without fraud, it confers an entire right of action, not liable to be affected by proof that the goods proved to be of an inferior quality to that expected, and that the defendant sustained an *unascertained* amount of loss by the contract; although when there is in the outset an *actual* and *definite* want of consideration, though *partial* only, it is a bar *pro tanto* to an action between the original parties. But on the other hand, when the whole or a part only of

the consideration is illegal, or fails through fraud to an indefinite or unascertained extent (as in the present case), the security being entire, fails in *toto*. It is laid down in general terms in the books, that fraud vitiates a contract ; and some of the cases seem to imply that no formal act of repudiation need be performed by the party deceived ; but general language used by the courts, in giving their opinion in any case, must always be understood with reference to the subject matter then before them.—1 H. Bl. 17 ; 2 Taunt. 2 ; 3 Ea. 123 ; 2 B. & C. 688. I am of opinion, as a general principle, that fraud vitiates all contracts and renders them void upon its detection, at the option of the party imposed upon. There is a difference, however, between consideration illegal and fraudulent. In many cases of the former kind either party may take advantage of the objection, on the ground that where both are "*pari delicto*," *potior est conditio defendantis*. In those of the latter description, the innocent party only can avail himself of the exception, whether as plaintiff or defendant, and it rests with him, at discretion, to avoid and repudiate the contract or to affirm and adhere to it.

When a contract remains wholly executory, fraud constitutes a defence to an action to compel performance ; it is enough for the defendant to shew the deceit ; nothing previously was required by him to be done. The same rule would apply had he advanced the consideration on his part, but had received nothing in return, and in detecting the fraud had elected to abandon the contract and to recover back the money paid by him, as had and received to his use. Having reaped no benefit, his silence could not be construed into an affirmation, and no step would seem called for in disaffirmance to such a case ; therefore, the general rule would apply in full force ; the contract might be avoided *ab initio*, but it was only so void at the election of the defendant, and, under the circumstances supposed, nothing would have arisen or intervened to compromise or affect his right to exercise that election when sued. Such a defence would in itself, if open to the party, abundantly constitute thenceforward a disaffirmance and repudiation.

When however a contract, consisting of various items or parts on each side, is partly executed, both parties mutually receiving a substantial benefit under it, leaving a portion only still to be performed, the rule is not so clear. The parties are no longer in *statu quo* as upon a mere executory agreement, and it often happens that they cannot be restored to that situation. Some rules may be extracted from the authorities, applicable to such a case ; they are such as arise out of contracts of sale, for example, executed or executory, as goods sold, delivered and accepted, or goods to be furnished according to a sample, or to order, or for a specified purpose, &c., or upon contracts accompanied with express warranties, or only implied warranties, or wanting any warranty at all, and also, lastly, upon agreements tinged with *fraud*. An absolute sale, with full opportunity to the vendee to judge of the article bought, is final, and cannot in the absence of warranty or fraud be rescinded by the buyer, without the assent of the seller. It is said, that in cases of warranty, express or implied, there is involved the *condition* that the vendee may annul the sale if on inspection or trial there appears a breach of the warranty. I am not quite satisfied on this point. In many instances, there is a *condition* in the bargain, express or implied, that the vendee may reject the commodity within a specified or a reasonable time, not by virtue of a warranty, but by the terms or conditions of the bargain or agreement ; a condition which the warranty, as such, does not seem to me so clearly to include, although according to its language and import such a right may often be gathered from it, or be regarded as incorporated with it. A breach of warranty is admissible in mitigation of damages in an action for the price, or an action lies thereon for redress in damages, with or without a return or tender of the goods purchased.

So fraud or deceit in a sale, unattended with warranty, amounts, it is said, to a warranty express in law, and clothes the vendee with all the rights, and the vendor with all the responsibilities, that attach thereon ; and it seems to me also to create a right (on detection) to reject the goods, although previously accepted. It enables the vendee to

repudiate the agreement in *toto*; but in that event it becomes important to examine whether he must not (having derived a benefit) act with promptitude, and place the vendee in *statu quo*, or at least so far as in his power. It is clear that in cases of warranty or conditional purchases wanting fraud, the contrast subsists *pro tem.*, and that, if dissatisfied or disappointed, the party entitled to the privilege must rescind it promptly, when the event arises that authorises him so to do; and that he must not only resolve in his own mind, but must signify that intention to the other party, at the same time tendering back or giving him notice to send for and take away the goods or other benefit of which he may have previously acquired the possession. If he cannot place the vendee in *statu quo*, or shew that the articles furnished were of no value or use, he cannot resist his note by reason of the unliquidated and uncertain partial failure. When fraud appears, the right to renounce the contract and to treat it as void results from its discovery. It is voidable, at the election of the injured person; and by restoring whatever he received, he can undo it *ab initio*. In the case of Lewis v. Cosgrove, 2 Taunt. 2, it was held at the trial that the defendant could not resist an action on his cheque, although he had tendered back the horse warranted sound (which the plaintiff had refused to accept), on the ground that the vendee could not resist the contract against the will of the plaintiff, on the authority of Weston vs. Downs and other cases. This tends to shew that a mere warranty does not entitle the vendee to rescind the bargain. But when it was suggested that *fraud* attended the transaction, a new trial was granted, from which I infer, and many text writers seem so to understand, that the court conceived the material ingredient of fraud entitled him to repudiate the contract, which intention he evinced by tendering the animal bought. The case of Archer v. Banford, as reported in 3 Star. 175, is expressly in point in support of this inference; and although in that case it appears a new trial was granted, it was upon the ground that "the fraud was a good defence, and that as the defendant had actually paid more than the business was really worth, his

keeping the business and stock did not preclude him from resisting payment of the bill;" in other words, that the fraud enabled him to open the transaction, and that when opened it appeared as respected the *note* that there was a *total failure* of consideration. The ground taken by the Chief Justice, at the trial, does not seem to be impugned in any other point of view, and it cannot be inferred that a new trial would have been granted, had it appeared that the defendant had derived greater advantages under the contract than had been acquired by the plaintiff, exclusive of the note.

Other cases are applicable; and, in weighing them, it is important to bear in mind the difference between the relative situations of the litigant parties, as plaintiffs or defendants, and between the several suits to which the subject matter may give rise.—9 Moor. 159; 1 L. & W. 182; 3 Camp. 300; 3 Stark. 32 (n); 3 Esp. 82; 4 B. & C. 387; 1 H. Bl. 19; 1 Stark. 257; 2 Ea. 314; 4 Camp. 22, 144; 1 Camp. 190; 1 Mer. 643; 1 M. & M. 483; 2 D. & L. 182.

1. Actions for deceit. 2. Actions on a warranty. 3. Actions to recover back monies paid, as in assumpsit for money had and received. 4. Defences to actions for the price. 5. Defences to actions founded on bills or notes given or accepted for the price.

The two first are founded upon the contract, and affirm it. The three last disaffirm it, deny its validity and force, and cannot prevail, unless it be void or rescinded and at an end.

After perusing the cases distinguished according to the foregoing suggestions, their tendency in my estimation is such that I shall not be surprised to find it hereafter held, in the English courts, that when there has been a part execution on both sides to an uncertain extent of an entire contract, in which a part of the consideration on one side still remaining executory is found partially to fail to an unascertained extent through fraud, such fraud will not constitute a bar to an action for the recovery of a note given to secure the residue of the consideration on the other side, unless upon detection of the deceit the defendant shall have

promptly and unequivocally repudiated the whole contract, and have restored or offered to relinquish all benefit previously received by him ; in other words, unless he shall have offered to place the defendant in *statu quo*. Whenever a case approaching the present in its circumstances shall arise, I expect to hear that it falls within the rule I am disposed to adopt. I anticipate its being held that, when a substantial benefit has been obtained, it must be renounced as the only condition of rejecting the contract under which it accrued : that as the party in fault has no option to recede from the agreement by reason of his own turpitude, so the party deceived shall not be allowed to do so unless he simultaneously refund ; that he cannot hold to a part, and at the same time reject a part ; that his option is restricted to the full adoption or thorough abandonment of the contract in all its parts ; that he can retain no partial advantage ; that he can pursue no qualified or middle course : that as the one cannot urge the fraud at all, so the other shall not be heard to do it, unless he at the same time forego the beneficial portions of the transaction. This view seems to me equitable and just, and therefore I anticipate the result I have mentioned. In the mean time, my respect for the sentiments entertained by my learned brothers forbids my advancing unnecessarily a positive opinion on the above head.—1 Star. 434; 1 C. & P. 23; 2 Bing. 111; 3 Cam. 476; 4 Taunt. 847; 4 B. & A. 387.

At the same time I am constrained to add, that the rule of law, which I extract from all the authorities in the present reports, as applicable to this case, is, that if upon an entire contract, consisting of several acts to be performed on each side, some of which are mutually executed and others remain executory, and a note is given by one party to the other to secure a part of the consideration, and before its arrival at maturity the maker discovers that a part of that portion of the consideration remaining to be performed by the holder *fails* to an uncertain or unascertained extent, with respect to which the maker was deceived by the fraudulent misrepresentations of the holder, such partial failure pervading the whole contract, and therefore applying par-

tially to the note, the maker has a right to treat the whole contract, including his note, as null and void ; or to adhere to the contract, relying upon his right of action for redress in damages, at his election ; and that he may urge such fraud as a defence to the note, if he shall not have affirmed the contract subsequent to his discovery of the imposition, which affirmation may be shewn conclusively by overt acts, or be inferred from his conduct or other circumstances. From silence and lapse of time, acquiescence may be inferred.—2 Ea. 317. To prevent question, his proper course would be to signify his resolution to repudiate the contract, and to offer to restore whatever he had previously received. A notice without tender would be sufficient ; but if he remained passive, retaining in his possession and under his control whatever benefit or portion of the consideration (as a coach, for instance) he obtained before perceiving the deceit, such conduct, combined with lapse of time, would, under the circumstances, afford evidence to go to a jury, from which his election to abide by the agreement might be presumed.

The consideration for the note in suit, as respects the old notes, was, as before observed, rather Lasher's promise to restore them than his actually so doing, but they are so blended that a breach of the promise may be regarded as a failure of the consideration. Then the conduct of Lasher was fraudulent, and so the note tainted in part, and void in *toto* on that account, at the election of the defendant. Still the defendant could not avoid the note without repudiating the whole contract, for the fraudulent failure of the consideration affects the land and stock, as well as the note. Consequently the important question is, whether the defendant, since detecting the imposition, has affirmed the agreement, or concluded himself from impeaching or rejecting the contract, on the score of fraud. His conduct at Lasher's house was at least equivocal, and when regarded in connection with his subsequent silence, lapse of time, retention of Lasher's receipt, and apparent acquiescence in his keeping the stock, it rather argues an intention to decline acceptance of any of the old notes unless all were received,

and to rely upon his remedy by action for a default in this respect, than a design to undo the whole. It would not seem just that he should, for the space of two years, keep Lasher's receipt in his pocket and stand in a position to defeat him on any ground, to urge the fraud against the note, or the receipt against the accounts, if sued thereon. It behoved him to fix upon and follow a specific course. As the matter stands, it may be doubtful what his views and intentions were. It is probable he thought the note could be resisted without disturbing the residue of the arrangement, but that could not be done ; and if he contemplated no more, he could not in that event have held the receipt as mere waste paper, but as a valid, subsisting, available document. If doubtful, it should have been left to the jury to say whether, after notice of the deceit, he had affirmed the contract before this action was brought, or whether he had disaffirmed it. If open to him to disaffirm it now, the defence in this cause of course effectually does it.

I have no objection to a new trial upon the above question ; but I am not prepared to say, that in transactions of this kind, fraud to a partial extent vitiates the whole transaction whenever urged, without notice by the party deceived or a renunciation of the benefits and advantages derived under the contract, unless counterbalanced by other sufficient equivalent ; or that, under the facts in evidence in this cause, it is clear in law that the defendant has not affirmed the general contract and precluded himself from urging the exceptions taken, and that it is open to him to stand upon the fraud as a defence in this suit, without having previously signified more unequivocally the course he elected to adopt. It may be added, that the debt was due and payable to Lasher at the time of the settlement, and that the note was taken merely to accommodate the defendant. Had the money been paid at the time the note was given, it could not have been recovered back on the ground of the alleged fraud, without a rescission of the contract and an offer to return whatever the defendant had received ; and the note being taken as an indulgence, may distinguish it from similar instruments received under

different circumstances.—3 Camp. 38; 14 Ea. 486; 16 Ea. 207-8.

Per Cur.—Rule for a new trial absolute,
without costs.

FIELD V. KEMP.

Where, in an original survey, an allowance for road had been made between certain lots, and afterwards, and before 1810, grants are issued from the Crown, making the allowance between other lots: *Held*, that the grants must be considered most correct, and that the plaintiff, to whom one of the former lots belonged, was entitled to recover for a trespass, committed on that part of his lot, claimed as an allowance for road.

Trespass *quare clausum fregit*, tried at the last assizes for Niagara; the general issue pleaded and the question litigated, is, whether there is a public allowance for a highway between lots 15 and 16, in the 1st concession of the township of Niagara. If there be, then the defendant is entitled to a verdict; but if the public allowance is not proved to have been established between these two lots, but between 14 and 15, as the plaintiff alleges, then the verdict to be entered for the plaintiff. It appeared that the plaintiff was the proprietor of lot number 15 in the first concession and lot number 32 in the 2nd concession of Niagara, the ends of which abut on each other. The defendant is the owner of lot number 16 in the 1st concession and lot number 31 in the 2nd concession, which also abut on each other in the same manner, so that the possessions of the plaintiff and defendant range side by side through the two concessions; and the question is, whether the allowance for road is between their two ranges of lots, or between the plaintiff's lot and lot number 14 in the 1st concession and lot number 33 in the 2nd concession. On the original survey of Niagara, by Mr. Augustus Jones, a deputy surveyor, he commenced his operation at the north or garrison line, running up the river, and numbering the lots from north to south, leaving an allowance for road between every alternate lot, that is on the south side of every even-numbered lot, and that the concession contained an odd number of lots. He consequently left an allowance for road between lots numbers 2 and 3, 4 and 5, 6 and 7, 8 and 9, 10 and 11.

In granting these lands in the 1st and 2nd concessions, it seems that the original survey was not adhered to, but that the lots were numbered from the south to the north, as if the township had been laid out commencing at the south side and running down the river. It was shewn by several government patents produced, that his Majesty dedicated to the public, or reserved, allowance for public roads on the north side of every even-numbered lot, reckoned from south to north; and that the allowances made by the surveyor, in laying out the township, had not been adopted in the ultimate grants, but that such allowances had been included in the patent descriptions, as comprising portions of the lots granted. And at the trial, the point was raised in the following terms: "If there was, when action brought, an allowance for road between lots numbers 16 and 15 and lots numbers 31 and 32, then the plaintiff fails. If the plaintiff does not establish that a post, from which the line was run by Mr. Rykert, the surveyor (as in evidence), and to the southward of which he laid out a chain for a road, was the northern boundary or limit of the plaintiff's land, then he fails. If the contrary on both these points be established, then the plaintiff is entitled to a verdict, with nominal damages." The government patents for the lots in question were given in evidence; and from the descriptions therein contained, with other proofs, it was clearly shown that the government grants had deviated from the original survey, and the relative changes in the allowances for public roads were made under the authority of government, being previous to the provincial statute 50 Geo. III. c. 1. It was asserted, and evidence offered to shew, that statute labour had been done between the lots in question, and that the road had been travelled many years ago; but the attempt failed, and the jury, by their finding, expressly negatived it.

The question was argued principally under the statute 59 Geo. III. c. 14, s. 2, upon the evidence of the deputy surveyor, who stated he had left an allowance for road in the original survey, in the *locus in quo*, by *Draper*, for the plaintiff, and *Sullivan* for the defendant.

ROBINSON, C. J.—The evidence at the trial did not prove

that there had ever been a travelled road between the plaintiff's and defendant's lands, or that statute labour or public money had ever been laid out there. It rests therefore on the evidence of what the government have done, and the consequence of their acts. The description in the patent for lot number 15 in the 1st concession, shews clearly to my apprehension that the government had no idea of an allowance for highway between lots numbers 15 and 16, but intended otherwise, and supposed that the allowance was between lots numbers 14 and 15. So does the description in the patent for lot number 16. These are most strongly confirmed by the description in the patent for lots numbers 13 and 14, dated in 1798, which carries the limits of lot number 14 to within one chain of lot number 15; whereas the descriptions of both lots numbers 15 and 16 make those lots abut upon each other. The description in the patent for lots numbers 32 and 33, in the 2nd concession, affords clear evidence of the same understanding and intention of the government; for the width, from the south side of lot number 33 to the north side of lot number 32, is called forty-one chains, comprehending clearly an allowance for road between lots number 32 and 33. So that the patents are all consistent. On the other hand, Mr. Jones proved that he originally laid out the township, and that in his survey on the ground he numbered the lots from the town of Niagara upwards, and not from Stamford downwards, on which latter system the Surveyor-General has numbered them in issuing his descriptions, on which the patents were founded; and that his plan of survey was to leave an allowance for road after passing every two lots throughout the concession, which leaves an allowance between lots numbers 2 and 3, and between lots numbers 4 and 5, and so on. Thus lots numbers 15 and 16 must have been intended by him to be lots numbers 8 and 9, and to have an allowance for road between them. I cannot say, however, that it seems quite free from doubt on the evidence, whether Jones is correct on this statement, from recollection of his survey; but be that as it may (and I assume that he is), I am of opinion that there was no principle of law, nor any statute in force,

in 1798, or when all these patents were issued, which prevented the Surveyor-General or the executive government from altering the numbers and distribution of lots in a township, or changing the position of roads, so as to make the arrangement more convenient in their judgment than the surveyor proposed. It is quite clear that the King has expressly granted to the plaintiff, or those whose title he holds, all the land from the south side of lot number 15 to the boundary of lot number 16; and as the King had a right to make that grant, I consider the land up to that boundary to be plaintiff's. There is clearly a road left between lots numbers 14 and 15, but none established by any act or upon any principle between lots numbers 15 and 16, unless Jones' survey on the ground inevitably fixed a road there forever, unless altered under the statute of 1810. Had a public allowance clearly existed there in 1810, that statute would have confirmed it; but I think there was none then; the patents were all issued before 1800.

The jury have found for the plaintiff, subject to our opinion; and I think the verdict should stand.

SHERWOOD, J., expressed his opinion in favour of the plaintiff.

MACAULAY, J.—By the 12th sec. 50 Geo. III. c. 1; it is provided that all allowances for roads made by the King's surveyors, then laid out, should be deemed common public highways, unless any such roads had (then) already been altered according to law. Before the passing of the act, the King was not restricted from altering the original plan of a township (although laid out) previous to granting away the lots therein. In the original survey, allowances for roads would of course be made; and if afterwards the lots were located, described and granted in conformity with such operation, it would be inferred that the allowances so made were dedicated by the Crown as public roads; but if, after such a survey, his Majesty's government deemed it expedient to abandon, or to deviate from the principles of it in the future grant and disposition of the township, no law prevented the exercise of such a right; and it appears in this case that the original survey was not adopted or fol-

lowed in the numbering and description of the lots, or in the allowances for roads, in the 1st and 2nd concessions of Niagara, but that the numbering of the lots was reversed, and the dedication of roads accordingly altered. Possession seems to have followed according to the tenor of the patents, and the public usage has conformed to the public dedications indicated by such grants, and not to the original allowances. Under such circumstances, the act of 1810 does not apply ; and if it did, it could not be said that the allowances made by the King's surveyor had not been altered according to law. If it was legally in the power of his Majesty to make such alteration in his discretion, it was done ; and being done, such alteration being legal was made according to law—although it is not to be overlooked that the latter expression in the statute mentioned related rather to such alterations as had been introduced under former acts, than a change by the government in the principle of distribution originally contemplated. The language, however, is sufficiently comprehensive to meet the present case, and obviate all difficulty on the subject.

The only remaining question arises under the provision of the statute 59 Geo. III. ch. 14, sec. 2, that all boundaries or posts placed at the front angles of any lots, in the first surveys thereof, intended to determine the width of such lots, performed under due authority, should be the true and unalterable boundaries of such lots respectively. From this clause, literally applied, the lot owned by the defendant would be reduced to nineteen chains in width, and that of the plaintiff increased to twenty-one chains, although in the patents each is said to contain twenty chains ; for if, as was said, Mr. Jones, in going up the concession line from north to south, traced twenty chains for lot number 1, then twenty-one chains for lot number 2 and an allowance for road, placing posts at the end of the twenty and twenty-one chains respectively, to mark the south boundary of lot number 1 and the north boundary of lot number 2 respectively, and so on throughout the concession, it is obvious a post must have been planted twenty-one chains south from the north-east angle of the plaintiff's lot, and twenty chains from the

north-east angle, of which the northerly one chain was omitted in the grant and dedicated to the public for a road, and it is manifest that similar difficulties would extend to all the lots and roads throughout the concession. But it seems to me, the statute should have a reasonable construction and application, and that it can only properly be extended to those townships in which the government descriptions and grants have been predicated upon, and are intended to follow and conform to the original survey. In the present case, owing to some unexplained cause, the original survey was deviated from, and the lots described as if laid out by an operation precisely its reverse. Whether any second survey was made does not appear; there is nothing to shew such to have been the case; and it may be the fact that, although the patents refer to posts, as having been planted at certain points, no such posts were in truth ever so placed. Still it cannot be supposed that the general provisions of the act last mentioned apply to the front concessions of Niagara. The legislature had in view those townships, concessions and lots, in which the government patents followed, and are intended to correspond with the original survey, and not such as have experienced a thorough change. It cannot be supposed that, with a knowledge of the facts in evidence, the legislature would have passed any such law to govern the 1st and 2nd concessions of Niagara. Such peculiar arrangements as the present appear to have been and must be regarded as exceptions to the general rule intended to be laid down by the act referred to, and consequently the present case should be disposed of without the adoption of those rules, in this particular instance. It follows that there is no allowance for road between the lots of plaintiff and defendant, and that the plaintiff is therefore entitled to a verdict.

Per Cur.—Postea to the plaintiff.

DENNISON, ADMINISTRATOR OF DENNISON, v. SANDFORD.

Where a plaintiff having two actions pending, one in a representative character, and the other in his own right, referred both to arbitrators, who were to make their award by a certain day, or appoint an umpire in writing, and the arbitrators not being able to agree, appoint-

ed, but not by writing, an umpire, who made an award, which the arbitrators adopted and published as their own, before the time limited for making their award had expired, and awarded thereby a sum of money to the plaintiff in his representative character : The court, on affidavits of the umpire and one of the arbitrators that the money was intended for the plaintiff in his own right, refused to grant an attachment for non-payment of the sum awarded, and afterwards on motion set the award aside.

This cause was referred at Nisi Prius, in October, 1832. Another cause between the plaintiff, not in his representative capacity, and the same defendant was depending in the district court, which also was referred to the same two arbitrators. The reference to the arbitrators was with power to determine " all matters in difference between the parties," and to make their award by a certain day. In case they could not agree, then an umpire was to be named by them, who was to make his award and umpirage before another day named in the submission. The arbitrators disagreeing after they had several meetings, and heard the parties and their witnesses, named an umpire before the time had expired which was set for making their award. They did not, however, make their appointment in a sufficient manner, for it was not in writing, as the submission required. This third person entered upon the business of umpire, heard witnesses and made an award, or, rather, came to a determination before the day first limited in the reference had arrived ; and the two arbitrators adopting, as it seemed, the conclusion he came to, made and executed an award, on the 1st February, 1833 (the day limited for their award being the 4th February), determining that " this cause shall cease, and that the defendant shall pay to George Dennison, administrator of Charles Dennison, deceased, on demand, 4*l.* 10*s.* 1*id.*, with the costs of the cause, and 25*l.* for the costs of the arbitration and award." In Trinity Term, the submission was made a rule of court ; the money was demanded in August, 1833 ; and in Michaelmas Term last, an attachment was moved for. The defendant resists the attachment, and moves in the same term to set aside the award, upon grounds disclosed in the affidavits of the intended umpire, and of one of the arbitrators, who swore that they found nothing due to the plaintiff, as administrator of his brother's estate, and that the small balance of

4*l.* 10*s.* 11*d.* was found by them to be due by the defendant, upon his dealings with the plaintiff, in his private account. The affidavit of the other arbitrator was produced by the plaintiff in support of the award, and stated that he did not mean to award that balance as due upon one account more than the other. The costs of this suit, as it appeared, amounted to 29*l.*

Spragge shewed cause against the attachment, and *Sullivan* against the rule for setting aside the award.

ROBINSON, C. J.—Upon the facts appearing on these affidavits, I think it clear that the court would never order an attachment, even if they were satisfied that the arbitrators had proceeded regularly in point of form; because it is clear that a mistake has been committed in making up the award, the effect of which bears very injuriously upon the defendant. The award orders the payment of the money to the plaintiff, as administrator, expressly contrary to the intention of one arbitrator, and without any intention that it should do so on the part of the other. It is far from indifferent to the defendant on what account he is to pay this small sum; for by expressly assigning it in the award to the action by the administrator, depending in this court, the defendant is made subject to costs which amount to 29*l.*; whereas, if two of the three who have investigated these accounts speak correctly, the defendant should have had costs in that action, and should only have been made to pay the costs of the suit in the district court. The arbitrators, I observe, have awarded 25*l.* costs to be paid to themselves, apparently a very large allowance; and certainly we should not take the rigorous course of attachment against this defendant, for not paying an award of 4*l.* 10*s.* 11*d.*, with 54*l.* costs added to it, more than half of which seems to have accrued by mistake.

But I am farther of opinion, that this award ought not to stand. Independently of the objection already stated, it is not the award of these arbitrators who signed it. They disagreed within the period, and named, though they did not formally appoint, an umpire. It seems to have been formerly considered that, when arbitrators upon a submission

like this elect an umpire, they must be taken to have declared finally their disagreement, and to have waived the submission to themselves.—*Copping v. Haman*, 1 Lev. 285. But it is settled now that they may resume their power, and that if they do, their award will take effect and supersede that of the umpire, if he should in the mean time have made one; while, on the other hand, the umpire, if named before the arrival of the day limited for the arbitrators, may proceed and make his award within that period; and such award would be good, provided the arbitrators did not defeat it by resuming their authority and making one themselves.—*Smailes v. Wright*, 3 M. & S. 559; *Sprigens v. Nash*. 5 M. & S. 193.

But here the arbitrators (if they had effectually appointed an umpire) resumed their authority, and professed to make their own award between the parties; while it is evident that what they publish as their award was in fact the award of another person, to whom they could not delegate their authority in any other manner than as umpire, nor could his judgment be advanced except in the form of an umpirage executed by himself. That they might have executed an award *with* the umpire, if one had been appointed, is clear; but then their signatures would be regarded as signifying nothing, and on that account merely would not vitiate the execution by the umpire. Here, however, they *alone* sign, and publish an award which was in fact not their own. I am clear that this award must be set aside, and I think there is no difficulty on account of the lateness of the application, for the plaintiff also has delayed moving; and for causes such as exist in this case, the court should not be rigid in regard to time, when the submission was not under the statute.—*Rogers v. Dallimore*, 6 Taunt. 111.

SHERWOOD, J., and MACAULAY, J., agreed.

Per Cur.—Rule for attachment discharged; rule for setting aside the award made absolute.

EAKINS V. EVANS.

In slander, accusing the plaintiff of larceny, and a verdict for 150*l.* damages, the court refused a new trial, either on the ground of excessive damages, or that one of the principal witnesses for the plaintiff was shortly after the trial convicted of forgery and sentenced to banishment.

Slander in accusing the plaintiff of stealing a grindstone. Verdict for plaintiff, and 150*l.* damages. *Draper* moved to set aside the verdict, and grant a new trial, for excessive damages and because the principal witness for the plaintiff had since the trial of this cause been convicted of forgery and been banished. This witness had proved the words laid, and represented circumstantially all that the defendant said on the occasion, in a way calculated to enhance damages: but the words laid were proved by other witnesses to have been uttered at other times, varying from two to one year and less. The defendant was represented to be in fair circumstances, which is not denied; and the plaintiff, it was urged, had sustained serious injury from the slander. The defence did not elicit anything calculated to mitigate the obnoxious character of the repeated aspersion.

Sullivan shewed cause.

ROBINSON, C. J.—We have deliberated upon this case with a desire to give the defendant the opportunity of going before another jury, if we found it could be done without decidedly disregarding those rules by which the courts have hitherto governed themselves. The damages are considerable; and without any strong circumstance of aggravation, may be called high, at least as compared with verdicts in similar cases in this country, so much so, at any rate, that one cannot but feel it desirable that all the evidence upon which such damages were given should be of an unexceptionable character. But here (and it is one of the grounds upon which a new trial is asked) a witness, whose testimony was certainly material, was immediately after the trial convicted, at the same assizes, of the crime of forgery. Nevertheless, giving all the weight we can to both considerations, we are convinced we could not set aside this verdict without going against well established principles, and transgressing those limits which ought to be adhered

to. I cannot find that we should be supported by a single authority in awarding a new trial upon either ground.

As to the amount of damages: Many cases are to be found where a much larger sum (though the court did not approve of the verdict) has not been treated as excessive, so as to authorise interference on that ground, where there were no peculiar circumstances tending to shew the action to be frivolous. One may suppose circumstances in which even 100*l.* or 50*l.* might be safely called excessive damages, from the absurd nature of the slander, or the light manner in which the words were spoken, or the character of one or both of the parties, or perhaps from the occasion which provoked the words. But here is nothing peculiar; the imputation is grave; it charges a felony, it is circumstantial, and seems to have been made repeatedly and with malice, for nothing is proved in justification or excuse. In such a case, there is no principle on which we should set our judgment as to damages above that of the jury, unless we could conscientiously say that the estimate that they made was intemperate and outrageous. The language of Chief Justice Wilmot, in Redshaw v. Brook and others—2 Wils. 405, 4 Bing. 261—is precisely applicable to this case: “Although I myself may think 200*l.* too large damages, yet how can we draw the line to fix the measure of damages in this case. I cannot say the jury have done wrong, and perhaps if I had been one of the jury some of them might have convinced me that 200*l.* damages are little enough.” This case is one in which it is more evidently proper to hold this language than in the one cited, in which the court refused even a rule to show cause.”

As to the other ground—the subsequent conviction of the witness for forgery; it is clearly held that the reception of evidence that ought not to have been received is not a ground for a new trial, when there was sufficient evidence besides to support the verdict. Here four witnesses give such evidence as to leave no room for doubt that the defendant, for some reason or other, took upon himself to fasten an imputation of theft upon the plaintiff. If he had any warrant for it, he did not shew it at the trial. If the witness

had been legally incompetent when he was examined, the court would not in such a case disturb the verdict on that ground, the cause of action being so clearly made out on other evidence. And it would be going too far to do it when he was not incompetent at the time, and when nothing has transpired since to disprove the truth of his testimony. That would be to rest the case upon the bare fact of his becoming afterwards infamous ; and this no authority will warrant. I thought till I came to examine the notes of the evidence attentively, that the evidence of this witness was absolutely necessary to the plaintiff's case ; but it certainly was not so.—Styles, 466; 5 T. R. 257; 7 Bing. 336; Cowp. 230; Llofft. 87; 9 Moore, 581; 4 M. & S. 140.

SHERWOOD, J., and MACAULAY, J., of the same opinion.
Per Cur.—Rule discharged.

SHORT v. LEWIS.

In trespass for an assault and battery the defendant offered to prove, in mitigation of damages, that the plaintiff had used very slanderous expressions concerning defendant's wife, during defendant's absence from home, and which, being repeated to defendant on his return, he, on the spur of the moment, went to plaintiff and assaulted him. This evidence was refused, and the jury gave a verdict with 140*l.* damages. The court set aside the verdict to give an opportunity to elicit the whole circumstances of the transaction.

Trespass for an assault and battery, to which the general issue is pleaded. It appeared in evidence at the trial, that on the 19th February, 1833, defendant having a stick in his hand about three feet long, went, in company with one Wright, to the house of a Mr. Hinton, in which the plaintiff resided. That the defendant entered through Hinton's shop, and expressed a desire to see the plaintiff, who met him at the back door of that room. On meeting, the defendant said he wished to speak to plaintiff, who requested him to walk in ; on which the defendant desired the plaintiff to walk out ; but being invited by Mr. Hinton to go into the parlour, the defendant, Wright and plaintiff, entered. The door was shut ; soon after which a noise was heard, and, on Hinton's entering, he found the defendant beating the plaintiff with the stick. On Hinton's offering to interfere,

Wright prevented him ; and it was not till further aid arrived that the plaintiff was rescued from the defendant and Wright, who assisted him. Wright was not called, and no one present at the commencement of the assault was examined. On cross examination, the plaintiff's witnesses were questioned as to the account he gave of the matter. It was said he related that, on entering the parlour, the defendant observed that he understood he (plaintiff) had been speaking disrespectfully of his (defendant's) wife, when the plaintiff inquired who his author was ; that defendant replied it was no matter, that he believed it, and forthwith assaulted him. On the defence, it was offered to be proved, in mitigation of damages, that repeatedly before the assault, the very day before, on one occasion, the plaintiff had used offensive and opprobrious epithets towards the defendant's wife, adding that the slander was not actionable, and that towards a married woman it could be indulged in with impunity. That the defendant (having been absent) only heard of this conduct half an hour before the assault.

Macaulay, J., before whom the cause was tried, said he thought the transaction itself might be proved, but that as the defendant went deliberately, with a friend, to assault the plaintiff, he could not introduce any antecedent matter to justify or mitigate the trespass ; the same not forming any part of the *res gesta*, however it might have excited the feelings of resentment that induced the matter ; that the defendant could not shew, in palliation of an assault and battery, that he had heard from some other person that the plaintiff had aspersed his wife at a former period. That a libel struck up in a public place, and read by a person, who in the excitement of the moment hastened to and beat the offender, might perhaps be proved as constituting a continuing provocation, and forming all one transaction, as not only shewing the motive, but that he acted under the heat and passion created by such continuing provocation ; but when in resentment of a verbal slander, related by the mouths of others, and not addressed to the defendant or heard by him, the defendant deliberately sought the plaintiff with a deliberate intention of chastising him, it seemed

to him the provocation was too remote ; that by such proceeding he took the law into his own hands and gratified his revenge, in doing which he committed a breach of the peace and clothed the plaintiff with an action, and must on his part submit to whatever damages a jury should award. That there was no immediate provocation admissible in evidence as a part of the *res gesta*, or so immediately connected with the assault as to shew the defendant acted under heat of passion, proceeding from any exciting cause that a court could recognize. The evidence offered being refused by Macaulay, J., the counsel for the defendant declined making any defence, and did not address the jury, who found for the plaintiff with 140*l.* damages ; and last Michaelmas Term, *Draper* moved to set aside that verdict, and grant a new trial, on the ground that the mitigatory circumstances offered to be proved by the defendant should be allowed to go to the jury.

Small shewed cause.

The court took till this term to consider, and now judgment was given.

ROBINSON, C. J., and SHERWOOD, J., expressed their opinion that the evidence should be heard, in order to ascertain distinctly whether it might not have a bearing on the case, so as to be proper to go to the jury in mitigation of damages. That the verdict was larger than in all probability it would have been if the alleged provocation had been shewn, as also that the defendant acted immediately under it ; and that as it seemed doubtful whether the plaintiff was not so far culpable, as to render his claim to such damages open to question, that there should be a new trial upon payment of costs.

MACAULAY, J.—Damages and matters naturally arising from the act complained of may be given in evidence in aggravation of damages, under the usual averment of *alia enigma*, without being stated specially, but they must be the legal and natural consequences of the wrong, immediately connected with or immediately following the trespass or other injury. It is always the practice to give in evidence the circumstances which accompany and give a character

to the trespass.—2 Mod. 79. In civil suits of this nature, the *quo animo* or intention of the aggressor is immaterial as respects the right of action, although there are cases in which the malicious intention of the defendant has been shewn to enhance damages.—2 Stark. N. P. C. 282. In slander, the malice is the gist of the action, and the *malus animus* is in other cases a material ingredient in the offence ; but it is otherwise in trespass *vi et armis*.

It would seem, on the other hand, that damages may be mitigated by proof of the incidents which accompany and give a character to the act, or which can be properly regarded as forming a part of the *res gestæ*; and also collateral circumstances connected with the transaction, which, so far as they go, tend to support a justification, but which fall short of such a defence, as that an arrest and imprisonment was upon a well grounded or reasonable cause of suspicion of crime.—R. & M. 424. In some actions, rumour or general character, but not facts, may be shewn in reduction of damages, but each case must depend upon its own merits. It does not appear to have been established, that matters of insult or provocation, which if true to the utmost extent would constitute no justification, are entitled to consideration ; or that the *quo animo* or motive (at least, when not brought in question by the plaintiff to enhance damages) can be shewn by the defendant to mitigate the amount. Whatever the plaintiff is at liberty to urge in order to increase the sum may of course be rebutted by the defendant ; and when the resentment can be connected with a provocation on the part of the plaintiff, it may be proved. Provocation, to mitigate damages in a case of assault and battery, which no mere provocation by words can justify, must be so recent and immediate as to warrant the presumption that the battery was committed under the immediate influence of the feelings and passion excited by it. After the blood has had time to cool, and the passion to subside, the aggression is attributable to a spirit of deliberate revenge, rather than human infirmity, under the influence of heat and anger, provoked by the insults of the opposite party. In Watson v. Christie, 2 B. & P. 224, Lord

Eldon ruled' that, in trespass for assault and battery, and not guilty pleaded, the attendant circumstances of the assault and battery could not be taken into consideration, with a view to reduce the damages below the extent of the evil suffered, the plaintiff being entitled to recover a full compensation for the injury actually sustained. It may perhaps be understood that his lordship merely contemplated the substantial bodily injury sustained by the plaintiff, without regard to any thing more. Still, in these actions, the legal injury is generally considered as compounded of the positive bodily harm and pecuniary loss ; but the nature and spirit of the insult, as evinced by the time, place, and other circumstances attending the indignity, Lord Eldon does not insinuate that remote and collateral considerations could be allowed to alleviate the case, even as respected the claim for damages, beyond the absolute loss or injury. It appeared in the present case, at Nisi Prius, that no personal intercourse had taken place between the parties, previous to the assault ; consequently, no immediate provocation could have been received, and, on the plaintiff's part, it was not attempted to prove the motives or inducement actuating the defendant. The bare assault and battery, as it occurred, alone appeared in evidence. It was offered to be proved, in mitigation of damages, that, half an hour before the battery, the defendant, who had been absent from home, casually heard that in his absence, on various occasions, and so recently as the day before, the plaintiff had traduced his wife. My impression at the time was that, however irritating such conduct might in itself be, it did not constitute any subsisting, continuing, or immediate provocation, so linked with the assault that followed, as to entitle the court and jury to regard it as a part of the *res gesta*, as all forming one transaction, and in that point of view as admissible in mitigation of damages. The cause of resentment in the defendant was remote and detached from the assault. The words alleged to have been used could not have been addressed to or heard by the defendant, and they had been uttered upon former days ; and although it was said a short time only intervened between the first

learning of the slander by the defendant and the chastisement inflicted on that account, still it appeared to me that he acted deliberately, and calmly sought the plaintiff with the premeditated intention of beating him with a weapon procured and carried for the purpose. Had death ensued, the crime would have been susceptible of no mitigation. It occurred to me that if the plaintiff had used actionable words against the lady mentioned, a resort to legal proceedings was the proper course for the defendant; but if they were not of that nature, the offence constituted one of those injuries for which the municipal laws of the country afforded no remedy, and to which therefore, however difficult or mortifying, it was the duty of the defendant to submit; or at least that, in the absence of any legal redress, it was incumbent upon him to abstain from personal violence. In acting as he did, he took the law into his own hands, and in an apparent spirit of animosity or revenge redressed himself for the insults supposed to be offered to his family; and by so doing he seemed to me to have exposed himself to an action, and to such damages as from the nature of the outrage a jury, without hearing his reasons scrutinizing his motives, or weighing the matter offered in palliation, might think fit to award. I am not prepared to say that a provocation previously offered may not be so far continuing as to be connected with an assault and battery perpetrated afterwards; but I have not been able to satisfy myself that the mere hearing, in the absence of a party, of his slanderous expressions on former occasions, however obnoxious, can excuse or be heard to mitigate damages, when the party experiencing that kind of insult shall afterwards, however promptly, have deliberately sought the traducer and inflicted a premeditated battery upon his person. However, since my learned brethren are disposed to think that the defendant may be able to shew in this case that he acted in the heat and resentment roused by a provocation proceeding from the plaintiff, and sufficiently connected therewith to render it admissible in mitigation of damages, I have no objection to a new trial, in order that the facts themselves as they occurred may be elicited, for

the further consideration of the question raised in this case, a question of great practical importance, and by no means well settled and understood. At the same time, I cannot say that subsequent research has yet convinced me that the course I took at Nisi Prius was incorrect ; still, since it is not approved by my brothers on the bench, I feel great satisfaction in thinking that the defendant will enjoy the benefit of a further hearing, and that the result will ultimately depend upon additional opinions of higher authority, and entitled to much greater weight than mine—2 M. & S. 79 ; 3 Wils. 19 ; Bull, N. P. 89 ; 6 East. 188 ; 2 Ch. Rep. 198 ; Holt, N. P. C. 700 ; 1 Star, 78, 98 ; Peake, 46, 62 ; 6 Mod. 127 ; 2 Sal. 642 ; 2 T. R. 166 ; 1 Camp. 493, 58 ; 2 Star. N. P. C. 318, 282, 164 ; 3 Ea. 1 ; 2 B. & P. 289 ; 3 Star. Ev. 1460 ; Esp. Dig. 337 : 12 Mod. 232 ; Bull, N. P. 17 ; 2 B. & P. 224, n. ; 2 M. & S. 79 ; 2 Camp. 511 ; 2 Ch. Rep. 198 ; Dow & Ry. N. P. C. 10 ; 1 R. & M. 424.

Per Cur.—Rule absolute on payment of costs.

SPAFFORD V. BUCHANAN AND MALLOCH.

In an action for a malicious arrest, an examined copy of the affidavit, on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant.

Trespass for seizing goods. Plea : general issue. The trial took place before Macaulay, J., at the last assizes for the Midland district. It was opened to the court and jury, by the plaintiff's counsel, that the defendant (Malloch) was Mr. George Malloch, of Brockville, an attorney of this court, and that Isaac Buchanan was an individual whose name appeared as one of the parties to certain judicial proceedings about to be produced, and under which the trespass in question was committed. The defendant, Buchanan, being sought to be charged as one of the plaintiff's in those proceedings, and the defendant (Malloch) as the attorney of such plaintiffs.

The first step in the proof was the production of a writ of attachment, issued in February, 1832, at the suit of Isaac Buchanan and several others, against the effects of the

plaintiff, directed to the sheriff of the Midland district, by whom it was received on the 28th February, in a letter from Brockville, signed George Malloch. The sheriff was called as the first witness for the plaintiff, and proved the receipt of the writ in a letter, directing its execution ; and which letter he supposed was from Mr. Malloch, the attorney, at Brockville ; but he added that he was unacquainted with his handwriting, and that he had lost the letter, and could not therefore prove that the signature of that individual was attached to it. He took it for granted it proceeded from Mr. Malloch, the attorney, the defendant, but could not swear to it. The letter might have been written, he said, by Mr. Malloch's brother, in his name or by a stranger, but he only knew of one George Malloch. The sheriff likewise proved a warrant issued by him, 29th March, 1832, to one Henry Yager, to execute the warrant or writ of attachment. Yager was next called, and proved the seizure, at Belleville, of the plaintiff's goods under the warrant, to the value of 959*l.* 3*s.* 8*½d.* On cross examination he said he had received no directions from either of the defendants, touching the matter. A rule of this court was next put, in ordering the writ of attachment to be set aside upon hearing counsel for both parties, but upon what ground did not appear on the face of it. Mr. Baldwin, of Belleville, with whom the goods seized had been stored by Yager, was then called to prove that, subsequent to the rule for setting aside the attachment, the plaintiff had demanded the goods, which he refused to restore unless authorized by the sheriff ; and in the course of his examination in chief, copies of affidavits were admitted. The copies purported to be a copy of an affidavit of debt in the usual form where an attachment is contemplated, made by Isaac Buchanan, of the town of York, in the Home district, merchant, sworn before George Malloch, a commissioner of the court at Brockville, on the 11th February, 1832, in which the deponent made oath that the plaintiff was indebted to him and the other parties named as plaintiffs in the attachment, in the sum marked in the writ, upon a bill of exchange drawn by the plaintiff in favour of Messrs. Guild & Co., &c. ; also

a copy of an affidavit by two other persons, of the concealment or departure of the plaintiff, sworn before the same commissioner, at the same time and place. The plaintiff was about calling the clerk of assize to prove these copies when so admitted. How far he could, if examined, have proved that the writ had issued under the originals, did not appear ; or what the defendant's counsel, in his own mind, meant to admit, was not explained. Macaulay, J., said, his impression, from the course which the plaintiff's counsel were pursuing and the way in which the admission took place, was, that the defendant's counsel admitted the copies offered to be correct transcripts of original documents in the Crown office at York, which had been exhibited to the witness at York, who had examined the copies, by the person in charge of the office, as the affidavits under which the writ of attachment, in the former suit of Buchanan and others against Spafford, had been obtained. The witness might be at least expected to prove that much ; and unless the admission was intended to go the length that the witness could have gone on examination, or to admit whatever he was offered to prove, it could only tend to mislead and embarrass the plaintiff, instead of obviating difficulties and saving time. Of mental reservations (Macaulay said), the court could not be aware. No judge's order, or order of court, authorising the attachment, was produced ; and the original affidavits and the writ produced were not connected by any express link of evidence. Mr. Baldwin said he had never been authorised to give up the goods by the sheriff or either of the defendants, and they remained still in his possession. On cross examination, he said he would have relinquished the goods upon the sheriff's order and payment of storage, but not upon the order of either defendants.

Mr. McCollum, one of the appraisers under the statute, stated that the goods had been inventoried at the Montreal prices, and amounted to 959*l.* 3*s.* 8*½d.*; and that if going to sell them at Belleville, he would add 25 per cent. for costs, charges and profit.

When the plaintiff had closed his case, the defendants' counsel objected—

1st. That the plaintiff had shewn a rule of court which justified the levy, and did not prove any service upon the defendants, or either of them.

2ndly. That there was no evidence of identity to connect the present defendants as parties to the proceedings, who, if at all, acted through the sheriff.

The first point was overruled ; and it was decided upon the second, that as to the defendant Buchanan, it must go to the jury ; as to the defendant Malloch, that there was no evidence against him, and that he should be acquitted. The defendant's counsel then addressed the jury, but called no witnesses. Macaulay, J., charged the jury that they must first consider whether the defendant Buchanan, was proved to their satisfaction to be connected with the former proceedings, of which he thought there was evidence to go to them. If so, then whether the goods were the plaintiff's at the time of seizure ; and if so, to find against Buchanan for the value, because not restored. If the defendant Buchanan, had directed the sheriff to restore them, and had authorized the plaintiff to receive them, and had given him notice accordingly, then the full value could not perhaps be claimed, but damages merely up to the period of relinquishment ; but that, as matters stood, the plaintiff was still deprived of his property.—7 Bing. 676. The jury found for the plaintiff against the defendant Buchanan, with 1198*l.* 14*s.* damages, and for the defendant Malloch.

A new trial was moved for in Michaelmas Term last, by *Draper* for the defendant, upon the exceptions taken at the trial, also upon the ground of surprise and the discovery of new evidence, the defendant Malloch concurring in the application. *Bidwell* and *McKenzie* shewed cause ; and the court not agreeing in opinion, the cause stood over for judgment. The opinions of the judges were as follows :

ROBINSON, C. J.—It is to be considered, first, whether the jury were warranted by the evidence in considering the affidavit to have been actually sworn to by any person bearing the name of Isaac Buchanan. In other words, was there sufficient proof that this was a genuine affidavit. 2ndly. If they were warranted in assuming this, were they

warranted in assuming that the Isaac Buchanan whose name appears as the deponent in that affidavit was the same Isaac Buchanan against whom the action is brought.

It would seem, on the first impression, that there really was no evidence to make out these two facts, viz., the genuineness of the instrument and the identity of the party, especially the latter; and it is difficult to reconcile it to one's general ideas of the principles of evidence, that the plaintiff should be allowed to recover without adducing further evidence, tending directly to prove the personal agency of the defendant in suing out the attachment. In the case of *Crooks v. Dowling*, 3 Doug. 77, cited in argument, Lord Mansfield seemed to think that some such evidence, in a case like this, was indispensable; and if this case were altogether in accordance with later authorities, I should think it supported, though not very distinctly, the defendants' objection. But though, in that case, further evidence than was given here seems to have been thought necessary, and though, in some of the Nisi Prius cases cited in the argument from Campbell's Reports, individual judges have acted under the same impression, I am of opinion that the point is now settled otherwise; and after considering the cases of *Cameron v. Lightfoot*, 2 Bl. R. 1190, and more especially *Hennel v. Lyon*, 1 B. & A. 182, I feel it impossible to say that there was not sufficient evidence to entitle the plaintiff to recover. The judgment of the court in the case last cited, I look upon as a deliberate and express decision of the very question; for though the facts are not precisely similar, as they seldom are in any two cases, the whole reasoning of the judges, and the principles on which they found their judgment, apply strongly to the case before us. It is true that in a late Exchequer case, 4 McL. & Y. 389, a portion of the court seems not fully to concur in the principles laid down in this decision; but if the judgment in that case were decidedly irreconcilable with that in *Hennel v. Lyon*, which it is not by any means when the two cases are compared, I could not consider it sufficient to prevail against the unanimous opinions of the judges of the King's Bench, in a case of such good authority; and

especially since the court of King's Bench, in the case reported in 2 D. & R. 348, expressly affirm the decision of Hennel v. Lyon, and declare "that there is no ground for contravening it." I have no difficulty, after examining and reflecting upon the point, in bringing my mind perfectly to agree with the reasonableness of this decision, and with the opinion of the learned judge at the trial, though my first impressions were different. In Hennel v. Lyon, Lord Ellenborough seems to account it an anomaly in the law of evidence, that no proof of identity should be required in a civil action upon such acts as they were then considering, while proof of the genuineness of the affidavit, and the identity of the person making the oath, is always held accessory on a prosecution for perjury. But the difference seems to me naturally to proceed from the principle, that no man shall be convicted of a crime upon mere legal presumptions, where direct evidence of the facts can be given; the same principle that holds a person in many cases to give some evidence of a negative (contrary to the general maxim), where the object is to fasten a crime upon the defendant. In civil cases, for convenience, the law presumes facts from certain premises, so far as to make out a *prima facie* case, liable of course to be rebutted by proof on the other side, but which in the first instance the court and jury may take as sufficient. Here the attachment was produced under the seal of the Court of King's Bench. The record upon which the issue was joined emanated from the same court, and the judge who presided at the trial was necessarily a judge of that court. He was bound to notice (because a public statute requires it) that such attachment could not legally have issued without a proper affidavit, and bound to assume that neither the court nor a judge would have ordered it, without such an affidavit as the law required. Upon the principle that *omnia præsumantur rite esse acta*, he was also warranted in assuming that the officer did not issue it without that authority, which could only have been obtained upon filing a proper affidavit. Thus when a paper is produced, sworn to be a true copy of an affidavit remaining on the files of the crown office, and just such in every

particular as the plaintiff's suing out the writ, and among them Isaac Buchanan, must have filed in order to obtain the attachment, he was bound, in my opinion, upon the authority of the cases cited, to look upon it as proved *prima facie*, at least, that an Isaac Buchanan did actually make the affidavit of which the copy is produced. The writ shews the necessity of making it, and shows also that the paper filed in the office was accepted and acted upon as genuine. The two papers agree together in dates, parties and sums, a coincidence sufficient to induce belief, in the first instance, that they have a relation to each other ; and though it might be (though to be sure it is most improbable) that there were two suits agreeing together in all these particulars, the court will not presume or suspect that to be the case. If it were so, it could be proved. Then the affidavit, being thus delivered by the judge to the jury, as proved *prima facie* to be a genuine affidavit, on which the attachment issued, it is established that an Isaac Buchanan did make the affidavit of which the copy was produced, and that the attachment issued upon it. That the Buchanan who swore to it was the same Buchanan sued in the action, is the next point to be made out. In an indictment for perjury, it is clear that it must be somehow shewn that the defendant was the identical person who took the oath. In civil actions, the general rule is not to doubt the identity, nor to surmise that there is another person of the same name, unless it is suggested, and some colour given to the denial. When we call to mind the course of evidence at Nisi Prius, we shall find that this principle is acted upon every day. It is common for subscribing witnesses to have lost all recollection of the personal appearance of a stranger, whose signature they witnessed many years ago. He is not asked to identify him, unless a doubt is raised. An indorsee of a note recovers as of course on proving the indorsement to be in the handwriting of a person bearing the same name with the payee, without any proof of identity, though clearly he can have no right to recover unless the identity is considered to be proved. In tracing titles in ejectment, the person named as grantee in one deed is assumed to be the same person

as the grantor bearing the same name in the next deed, and so on. It is assumed, though not proved. No danger flows from this ; but in practice this is most convenient. When the defendant does not by some evidence call in question the fact of identity, he may be safely understood to admit it. It is not easy to conceive a case under which he could be under any difficulty to shew that he is not the person, if in fact he is not ; and if from surprise or mistake a cause of action should happen, at Nisi Prius, to be established against one Isaac Buchanan instead of another, there is always, in civil actions, a power to set matters right by a new trial, granted on equitable terms, the first step in obtaining which would be a distinct denial by the person suffering from the verdict that he was the person connected with the transaction.

That the affidavit remaining in the Crown office ought to have been received and acknowledged as a genuine affidavit, capable of being proved at Nisi Prius by a sworn copy, I think is fully established by what seems to have been admitted all round in the case of Cameron v. Lightfoot. It is not, in my opinion, a *voluntary* affidavit ; if it were, such evidence would not be sufficient. I look upon it as an affidavit used and accepted in this court, as the necessary foundation of a legal proceeding, and therefore entitled to be regarded as authentic until impeached by evidence.—*Gilb. Ev.* 50 ; *Bull. N. P.* 238.

Then the only objection is as to the identity of the party, and it must be confessed that on this point there are not a few cases, and especially at Nisi Prius, where evidence has been required of identity, upon principles which, for all that appears, are equally applicable to this case—4 Camp. 34 ; 2 Star. N. P. C. 239 ; 1 Stark. Ca. 304—but it is at least as clear that these cases are not to be reconciled with other decisions, and that they are at variance with daily practice—4 T. R. 28 ; 2 B. & C. 434. There seems indeed to be scarcely any question upon which the opinions of the judges appear to have been less settled and confirmed. I find no case in which the point has come more clearly and expressly in judgment than *Hennel v. Lyon*, and by that

case my opinion is governed. It is true that the Charles Lyon, the defendant there, was administrator of Mary Lyon, and the Charles Lyon, whose answer in Chancery was produced, was described also as administrator of Mary Lyon, and the coincidence was naturally advanced by the court as strengthening the presumption of identity, which would otherwise have rested upon the name alone; but, as I read that case, the judgment is not grounded on that coincidence of the representative character, but was avowedly founded on general principles of law, independent of it. Lord Ellenborough does not rest upon the description of "administrator." The other judges all notice it as a strong and satisfactory proof of identity: but they all recognize a general principle, which would equally have applied if the names alone had tallied. Bayley, J., says, "It would be impertinent for any other person but Charles Lyon to put in an answer to such a bill." We may therefore fairly presume that the answer was put in by Charles Lyon, and we may fairly conclude that it was the same Charles Lyon, for it was open to the defendant to shew that there was another Charles Lyon. Abbot, J., says, "It is not to be presumed that there are two persons of the same name, but the identity is rather to be presumed, unless the defendant could have shewn the contrary."

It is of course at all times in the discretion of a jury to say that they are not satisfied with the mere presumption, if a doubt is thrown upon it; and where any doubt is really cast upon it by evidence, the plaintiff will find it necessary to be more particular in his proof; but here there was no reason shewn for doubting it. The defendant does not even deny that he is the Isaac Buchanan who is partner in the house of Guild & Co. He simply says, you have not proved that I am the same. That is not calling the fact in question.

I have discussed this point so particularly, because it is one that may frequently be started, and it is of consequence to arrive at a proper conclusion upon it. In this individual case, there is no reason, so far as justice is concerned, to be very studious upon it; for the learned judge who tried the

cause, seems strongly under the impression that enough passed at the trial to warrant the jury in assuming, from the conduct of the defence under the explanation given at the opening of the cause, that the defendant in court was the person who sued out this attachment. Then, again, when the rule setting aside the attachment was given in evidence on the trial, the defendant's counsel objected, that no copy of it had been served on the defendant. Now, unless the defendants were the plaintiffs suing out the attachment, there would have been no sense in serving them with that rule. And after all, when the defendant came here last term for a new trial, in order to lay additional ground for it (not choosing to rely solely on legal points), he reverted to the grounds on which the attachment was set aside, and read the affidavits then used, and commented on them, in order to shew that the attachment was not sued out vexatiously, but that the then plaintiffs might well have conceived they were doing what was right. He also read an affidavit of the sheriff, speaking throughout of this attachment as sued out by the *defendant* in this cause. It is perhaps not very consistent with the dignity of a court, to be gravely investigating, at the instance of a defendant in a case like this, whether he was sufficiently proved upon the trial to have been the person who sued out the attachment, which he certainly must have been, unless he is now urging upon the court facts and arguments with which he has no connection. If, in fact, the Buchanan who is a partner in the house of Guild & Co., was not the Buchanan sued in this action, no fact could have been more easily proved, and then the defendant need have given himself no further trouble.

The verdict here is large ; and if, upon other grounds, I could see a reason for a new trial, I would readily grant it ; but I see none. The facts which the sheriff could have proved, that is, the issuing of a second attachment at the suit of the Bank, and what was done under it, if they were material, should have been elicited from him when he was examined at the last trial ; but they would have availed nothing ; that attachment was also set aside ; and besides,

how can we tell that the goods might not have been sold by the plaintiff before the second illegal attachment could have reached them? The damages may be rather high, but they are reasonably accounted for; and I do not know that justice can be better attained, after what has taken place, than to throw the goods upon the defendant, as this verdict will, and make him pay the plaintiff what they were worth when he illegally seized them.

SHERWOOD, J. (after stating the case).—The counsel for the defendant objected at Nisi Prius, and afterwards in banc, that the examined copy of the affidavit produced at the trial was inadmissible as evidence in that case. I incline to think the objection is sustainable. To make the examined copy of a document, filed in the office of the clerk, legal evidence on the trial of an issue in fact, I think it must be shewn that the original, if produced in evidence, would have been admissible without an extrinsic proof of its being genuine. To make the original evidence *per se*, it must appear to be a record, or a matter *quasi* of record. That the affidavit in this case was not itself a record of this court, is a proposition I consider too clear to require proof. I will therefore proceed to examine whether it is a matter *quasi* of record, of that description which would of itself be evidence on a trial like this, without any additional testimony. Before I go into the latter consideration, I think it proper to premise, that our provincial statute which affords the means of attaching the property of absconding debtors, does not require the affidavit upon which the order for the warrant is granted, to be filed in the office of the clerk of the court, and consequently it cannot be necessary to file it in pursuance of any particular enactment. I think the affidavit in this case may properly be likened to an affidavit to hold to bail before any action is commenced, with this difference, that such an affidavit is required to be filed by an act of the legislature, but the one in question, as I said before, is not. Now it appears to me, from several cases, that the copy of the affidavit to hold to bail is inadmissible to prove that any particular person swore to it, but is received merely to establish the fact of an affidavit being made and

filed generally ; but if it be necessary to prove particularly who made it, as in this case, then I think you must prove the hand-writing of the person who appears to have signed it, and that he swore to it.—*I B. & P.* 281 ; 3 *Mad.* 36.

The practice of admitting examined or office copies of affidavits as evidence, on the trial of civil suits, is modern ; and had its origin in the long established usage of admitting examined copies of certain proceedings of the Court of Chancery as evidence in the courts of common law. All the cases prove, however, that both are admitted on the same principle. The chief reasons for receiving them at all are the imminent danger of losing public documents of great importance, when removed from place to place, and the consequent detriment to the community attending their loss. Examined or office copies of judgments, and certain other proceedings in courts of justice, are therefore received in other courts as evidence, instead of the originals, upon the ground that public safety and convenience require their reception. Some documents filed in the course of judicial proceedings are called matters *quasi* of record, and copies of them are entitled in evidence, at *Nisi Prius*, in the trial of a cause, to the same consideration as copies of the entries in the journals of either house of parliament ; such also are answers of the defendant to a bill filed against him in the Court of Chancery, affidavits filed in the course of proceedings in courts of common law, and returns of sheriffs filed in court. The reason for receiving the copy of the sheriff's return as evidence on the trial of an issue in fact, rests upon a ground entirely different from that of admitting copies of answers and affidavits. The court receives a copy of the sheriff's return, because faith is to be given to the official act of a public officer like the sheriff.—*11 East.* 297. Another reason, and a very strong one, is that the sheriff is personally responsible in damages if he make a false return. No argument, therefore, founded on a supposed analogy between an affidavit found in the office of the clerk of the crown, and the return of the sheriff, can be sustained, in my opinion, in a case like this, because the person who

made this affidavit filled no situation of a public nature, and his act must be viewed, as it really was, the act of a private individual. It is important also, in order to arrive at a correct conclusion on the question now under consideration, to ascertain the particular purpose for which the copy of the affidavit was adduced in evidence at the trial by the plaintiff. His counsel did not attempt to prove, and therefore I take it for granted that it was not the fact, that the plaintiff supposed the defendant was at all concerned in the alleged trespass, further than the subscribing and swearing to the affidavit would necessarily implicate him. The affidavit purports to have been signed and sworn at Brockville in the district of Johnstown. It was not pretended the defendant sent it to York, or requested it to be placed in the office, or sued out the attachment, or delivered it to the sheriff, or gave any orders or directions respecting the seizing of the goods, or the detaining them after they were seized. How far the act of making the affidavit alone would have made him a trespasser, without further evidence to connect him more intimately with the transaction, is not now a question, as no objection was made by the defendant on that ground. It is quite clear, however, that it was indispensably necessary for the plaintiff to prove the defendant had made an affidavit of those facts, required to be sworn to by the statute respecting attachments, because the plaintiff's whole case turned upon that point. It was not enough to prove a statement in writing of the facts signed by the defendant, but the plaintiff was compelled to prove a written statement upon oath by the defendant. In other words he was bound to prove that the defendant actually swore to this affidavit, because that act formed the entire basis of this suit. How does he prove this? In the first place, he shows that one affidavit was found in the office. He then insists that the copy of such affidavit is sufficient to prove that a person of the name of Isaac Buchanan signed and swore to it.

The copy of an affidavit made by the defendant in one proceeding at law is receivable as evidence *per se* against him in another case, as his statement of certain facts upon

oath, precisely upon the same principle, in my opinion, and no other, than a copy of his answer to a bill in chancery, disclosing the same facts, would be receivable.

I wil therefore endeavour to shew the principle upon which a copy of an answer in chancery is admissible. It is receivable without extrinsic evidence of its being genuine, because it forms a part of the public proceedings of two parties, before a court of justice having jurisdiction of the case, according to the established practice and usage of the court. The test of the authenticity of such proceedings is their liability to the inspection and objection of either party. Each watches the movements of his opponent with all the acuteness of interested vigilance; the names and additions of each party are stated in the pleadings, without objection by the other, and consequently there cannot be a shadow of doubt that the persons so described are the real suitors before the court. It is but reasonable to hold that such proceedings, in a court of justice, as are liable to the objection of each party, must necessarily prove their own genuineness; but the same rule cannot by a parity of reasoning be extended to a proceeding by one party alone. An affidavit of debt, according to the case of Cosburn v. Reid, 2 B. Moore, 60, will not *per se* prove what person made it, although it be filed in the office according to the direction of a particular statute. It is true the point was not formally before the court for judgment in that case, but the remarks of the judges, and particularly of the Chief Justice, clearly lead to that conclusion; and when we find those observations supported by the principle to be extracted from all the cases, there appears to be no doubt of their correctness. Lord Chief Baron Gilbert, in his Treatise on Evidence, page 42, re-marks respecting a bill in chancery, "that the bill is evidence against the complainant, for the allegations of every man's bill must be supposed to be true; but where a bill is exhibited, and there are no proceedings upon it, then it cannot be given in evidence, unless they prove a privity in the party; for a man may file a bill in another man's name to rob him of his evidence by a sham confession." In page 50, he says: "An answer is proved by shewing

the allegations in court, viz., by shewing the bill, which is the charge, and the answer, which is as it were the defence to the bill; and this in a civil case shall be intended to be sworn, because the proceedings upon such defence are upon oath. Now, since the proceedings of any court of judicature within the kingdom are good evidence in other courts, it follows of consequence that in all civil cases the answer is to be taken as an oath, without any further proof but from the proceedings in the cause." In page 45, he says: "Analogous to this is a man's voluntary affidavit, which may also be given in evidence against him, but then the proceedings must be regularly given in evidence on which this affidavit did arise; and the reason why the proceedings also must be given in evidence, is to prove the identity of the person, for to prove an affidavit sworn is not sufficient, for it may be sworn by fraud and contrivance, the person being personated by somebody else." In page 50, he says: "A voluntary affidavit is no part of any cause in a court of justice, and therefore must be proved to be sworn." Now it appears to me that all affidavits must be taken to be voluntary, which are not made in answer to some part of the proceedings in a cause or motion pending in court. The using of an affidavit in a cause or motion pending in court is a sufficient evidence of genuineness, and comes precisely within the principle of an answer to a bill in chancery. A court possessing jurisdiction of the subject matter in dispute has examined the document without any objection having been made to it by the party whom it affects, and who has an opportunity to object, and thereby has recognized in a judicial manner the existence of the party whose name it bears, and that the allegations it contains are his. This kind of recognition in one court, is *prima facie* evidence of the same facts in any other court in the province.—3 Mad. 36. The mere filing of the officer, however, endorsed on a voluntary affidavit, would have no such legal effect.—9 Mad. 66. I will now endeavour to shew that the cases on this subject go to prove that the office or examined copies of affidavits, filed in court in the manner just stated, are the only kind of copies of affidavits

which are entitled to be received without further proof. Such copies are evidence without the originals being verified by extrinsic evidence, because the originals themselves, if produced, would be evidence without such proof.

The first case of which I am aware, as explanatory of the law in regard to the admission of copies of affidavits in evidence on the trial of an issue, is the one reported in Show. 397. Remarking on this subject, the court said : "The affidavit being of the defendant in the cause, adduced by him upon motion in court, it is enough, otherwise if not so ; but a copy of an affidavit only produced against a man, without proof that he made it, used it, or was concerned in the cause, would be insufficient." How does this doctrine apply to the affidavit now in question ? It was not proved the defendant Isaac Buchanan, made it, used it, or was concerned in taking out the warrant of attachment, or by any subsequent act of his own identified himself with the affidavit or the proceeding under it. It was not proved by any extrinsic testimony that any person of the name of Isaac Buchanan assumed any agency in the proceeding. The principal cases relied upon in support of the legality of admitting the copy of the affidavit in this cause are the cases of Cameron v. Lightfoot, 1 Wm. Blk. 1190, and Hennell v. Lyon, 1 Bar. & Ad. 182, but I am inclined to think they are different in principle from this. The first was an action of trespass and false imprisonment, in the court of Common Pleas, and was tried at the sittings in Westminster. The plaintiff, Cameron, had been sued and arrested by the defendant, Lightfoot, in a former action in the same court, and Cameron, the defendant in that action, had moved the court to set aside the arrest, on the ground that he was privileged from arrest. Lightfoot, the plaintiff in that action, filed an affidavit in answer to this motion, and the court upon hearing counsel set aside the arrest. Then Cameron brought his action against Lightfoot for false imprisonment ; and at the trial he was allowed to give the affidavit of Lightfoot in the first action in evidence against him in the second, without proving his handwriting to the affidavit, or that it was sworn by him. A special case was

made at the trial, stating all the important facts, among which are—"That the affidavit had been made by Lightfoot and his attorney, and filed in the court of Common Pleas, to shew cause against making absolute the rule for setting aside the arrest." It was therefore clearly admitted, on both sides, that Lightfoot had made and used the affidavit, and consequently there would be no necessity of further proof of genuineness. A privity was fully established by positive testimony, which was all the law of evidence required. The case of Hennell v. Lyon was an action of assumpsit against Charles Lyon, administrator of Mary Lyon, deceased, for goods sold by the plaintiff to the intestate ; to which action the plaintiff pleaded non-assumpsit and *plene administravit*. The defendant therefore admitted upon the record, that he was administrator to Mary Lyon ; for if he had intended to dispute the character in which he was sued, he should have pleaded specially that he was not administrator. At the trial, the plaintiff having proved the goods sold to the intestate, it became necessary under the second plea to prove assets in the hands of the defendant, as administrator. To do this, the plaintiff proved at the trial an examined copy of a bill filed in chancery against one Charles Lyon, administrator of Mary Lyon, by Messrs. Morthy & Co. ; he also produced a copy of an answer to the same bill, purporting to be the answer of Charles Lyon, in his character of administrator of Mary Lyon. Hennell, the plaintiff in the suit at law, was not a party to the bill in equity. It was objected, among other reasons, that the plaintiff should have produced the original answer, and verified the hand-writing of Lyon, or that he should have shewn by extrinsic evidence that Lyon, the defendant in the suit at law, was the same person who made the answer to the bill in chancery ; that, in the absence of such evidence, there was no proof of identity ; that it was not sufficient to say that the description of the defendant in the answer tallied with that of the defendant on the record in the suit at law. When the judgment of the court was given in banc, Lord Ellenborough said : "The admission of copies in evidence is founded upon a principle of public convenience,

in order that documents of great moment should not be ambulatory and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in courts not of record, copies whereof are admitted, though not strictly of a public nature. In all these cases it may be laid down as a principle that copies may be received. In this case, the answer being a proceeding in a court of justice, *must have been received there in the usual course*, and verified by the person putting it in, as the answer of the person sustaining the character which it imports him to bear ; and there is no question here as to that answer having been put in by a person bearing that name and character. But it is said that the evidence wants a further link to connect it with the defendant, and that it ought to be shown that Charles Lyon in the answer is the present litigant. I do not know any way by which that circumstance can be supplied but by the *description in the answer itself, which takes in almost every particular.*"

Abbot, J., said : "The objection is, that the answer ought not to have been received, because it was not shewn that the defendant putting in the answer was the identical defendant on the record ; but in order to ascertain that, let us look at the pleadings in this and that suit. In this he is sued as the *administrator of Mary Lyon*, and he does not plead that he is not the administrator ; he therefore admits that to be the character which he sustains. Then we find, upon the proceedings in chancery, a bill filed against *Charles Lyon, administrator of Mary Lyon*, and an answer put in by *Charles Lyon, in that character*. Now if the party to the suit in chancery is not the defendant, then there are two persons each of whom is *administrator of Mary Lyon*. There is nothing to shew *two administrators* ; and it is rather extraordinary to suppose two persons of the same name should sustain the same character."

Holroyd, J., said : "If the original bill and answer would be evidence, a copy would equally be evidence, without the original bill and answer, so far as the original bill and answer would be evidence, without further proof. Here, I think, the original answer would have been evidence. The

court having jurisdiction, it must be taken as the answer of the person against whom the bill was filed ; if *received in that court as the answer of the person who was the defendant there*, then it may be read here in order to see if it applies to the present case. If then the original would have been evidence, an examined copy stands in the same situation, according to the authority in Lord Raymond. Then, how does the question stand ? The person sued here is *Charles Lyon*, sued as *administrator of Mary Lyon*, and the copy of the answer shews the bill was filed against *Charles Lyon*, as *administrator of Mary Lyon*. There is therefore *prima facie* evidence that the *Charles Lyon* in that court and in this are the same person, which is the only identity wanted."

I will now compare a part of the evidence in the case of Hennel v. Lyon with the evidence given in this cause, and endeavour to point out the essential difference between them. In Hennell v. Lyon it appeared the answer was made to a bill in chancery : it was therefore a defence filed in court by one party against the charge of another, who was also in court. The answer was put in by a person who described himself by the same name and by the same character as the bill described the person against whom it was filed, and found a part of the proceeding *pendente lite*, in a court possessing jurisdiction of the matter in litigation. In the present case, the affidavit was a voluntary proceeding, made to obtain an order for an attachment to seize the property of a person against whom the cause or motion in court was pending, and is therefore not accompanied by any sufficient test of authenticity. It was, in my opinion, no proceeding in court, but only a step preparatory to a suit, and may properly be classed with a bill in chancery before any answer is put in, which I have already cited the authority of Lord Chief Baron Gilbert to shew is no evidence against the person in whose name it is filed, unless a privity is established. Another important case, elucidating the general principle which governs the admission of copies of affidavits made in one suit as evidence in another, is the case of Rees ex dem. Howell et al. v. Bowen, 1 McL. & Y. 380. It does not at all impugn the doctrine

established in *Hennell v. Lyon*, because the facts of the one are essentially different from those of the other. At the trial of the cause, the first count of the declaration was abandoned ; and to prove the title of the lessor of the plaintiff on the second count, an office copy of a bill, filed by the defendant against the lessor of the plaintiff, and a similar copy of an affidavit entitled in the equity suit, purporting to have been made by George Bowen, of Lleyngwair, the plaintiff in the equity suit, and which was the actual name and description of the defendant in the ejectment suit, was produced. The counsel for the defendant objected that the copy of the affidavit was not admissible in evidence, without verifying the signature of the original and proving that the George Bowen, by whom it purported to have been made, was the same George Bowen who was the defendant in the ejectment suit. I think the great difference between the circumstances of that case and the case of *Hennell v. Lyon* is, that in the former there was no answer by the defendant to the bill in chancery, as there was in the latter, and consequently there was no proceeding in court by which he distinctly admitted the genuineness of the affidavit. It therefore became necessary to prove it in some other way ; either by shewing that the defendant himself actually used it, or by proving his handwriting. For want of some such proof, the Court of Exchequer adjudged the copy of the affidavit inadmissible. Hullock, B., remarked : "I certainly conceive that the copy of the affidavit, under the circumstances in which it was offered, was not evidence. The ground for arguing that it should properly be received, was by assimilating it to *an answer*. I do not think it can be assimilated to an answer in all its circumstances, and therefore not in all its consequences. The case of *Hennell v. Lyon* goes to the extreme of the principle ; and the ground upon which Holroyd, J., held the copy to be admissible was, that the answer itself would be evidence, if produced. It is said here, that there is no difference between an affidavit which has been used and an answer. Probably I might go with the proposition to that extent, but there is no proof that this affidavit has been used." In another part of his

observations, he says: "This affidavit, not having been proved to have been *made* by the defendant, or *used* by him, the very basis for arguing that it is receivable in evidence fails."

My objection to the evidence given in this case rests upon two grounds. 1st. It is insufficient to establish the fact of swearing to the affidavit by Isaac Buchanan, of York, a partner in the firm of William Guild, jr., & Co. 2ndly. If there were evidence of that fact, then there is no sufficient evidence to identify the defendant with the person who made that affidavit.

The remarks of Baron Hullock I think peculiarly applicable to this case. They are in accordance with all the other cases, and advance the same principle, but in a manner more explicit. All the authorities go to prove this doctrine, that a copy of an affidavit is evidence, without extrinsic proof of its being genuine, when the original is made in such a judicial proceeding as will probably assimilate it to an answer in chancery. It cannot be correctly assimilated to an answer in chancery, unless it is filed in answer to some charge or allegation previously made by some other party in court. If the affidavit contain an allegation or charge against another, it then resembles a bill in chancery but not in answer; and unless you shew the proceedings upon it, a privity must be proved in some other way. If you shew proceedings on the part of the plaintiff, as by taking out a process, I incline to think that alone is not sufficient. The true test of genuineness, in my opinion, is the filing an answer. That fact raises a strong probability, of the authenticity of the bill or affidavit, and satisfactorily proves that the person the most interested of all others had admitted the bill or affidavit to be genuine. The bill, at the same time, proves the authenticity of the answer, because the plaintiff has allowed it to remain on the files of the court without objection.

I am of opinion, the defendant should also succeed on the second ground; namely, that there was no sufficient evidence to identify the defendant with the person who made the affidavit. Assuming, merely for the sake of argument,

without admitting the fact, that the evidence sufficiently established that one Isaac Buchanan, the partner of William Guild & Co., made the affidavit in question, what proof was there of the defendant being the same person? The only proof of such identity afforded by the evidence, in my opinion, is the correspondence of their names. The name of the defendant is the same as the name subscribed to the affidavit, but there the similarity between them ends. The defendant is not described in the suit as the affidavit describes the person making it. He is there described as a partner in the firm of William Guild, jr., & Co., of York; in the present case, the defendant is not described of any place or of any occupation. The question then is, can you presume he is the same person from his having the same name? To determine this, it is necessary to give a definition of the term presumption of fact. Mr. Starkie, and other writers on evidence, define it to be "An inference as to the existence of one fact from the existence of another fact, founded on a previous experience of their connection." Now our experience as to the frequent concurrence of the same name among many individuals, teaches us that it is quite as probable that there are more than one of the same name as that there is but one; at all events, the fact of there being but one of the same name is so doubtful that it ought not to be admitted as a matter of course, and without the admission of that fact it cannot be presumed the defendant is the same person. The evidence did not shew in what part of the province the defendant resided; it was consequently necessary to assume there was but one person in the province of the same name, before it could be reasonably inferred that the defendant made the affidavit. Such an assumption, I think, cannot fairly be made, for common experience in most cases proves the reverse; and without some peculiar cause to take this case out of the general rule, it must range within it. The balance of probabilities is not therefore, so clearly in favour of assuming that there is but one Isaac Buchanan in Upper Canada, as to warrant the adoption of such a proposition against the defendant. It is one which is neither self-evident nor demonstrable

without more proof. The general rule respecting the quality of evidence is, that the party who is to prove any fact must do it by the highest evidence the nature of the thing is capable of. It appears that the ground of this rule is a suspicion of fraud. If it be apparent, from the nature of the transaction, that there is better evidence of the fact, which is withheld, a presumption arises that the party has some secret or sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were brought forward his object would be frustrated.—Bac. Abr. Evid. 662; Carth. 250; Holt. 284; Salk. 281; Bull, N. P. 293-4; Show. 397. This rule is sometimes relaxed in certain cases—*3 Stark. Evid.* 389; but then its relaxation has no effect productive of injustice. It may make the road to justice rather more circuitous, but never wholly obstructs it. For instance, if an action be brought by the indorser of a promissory note against the drawer, and the general issue is pleaded, it will be sufficient to prove that a person of the same name as the one stated in the declaration indorsed it; but the same kind of evidence is not sufficient against the defendant, the drawee. It is necessary to prove the defendant's signature to the note, and it is not enough to prove that a person of the same name as the defendant signed it.—Peake Ev. 248; 2 Phil. Ev. 7; 1 B. & A. 20; 4 Star. Ev. 228. The reason of this difference I conceive to be this: If upon proof that a person of the same name as the payee endorsed the note, a final judgment should be entered against the defendant, after proving the handwriting to the note as maker, and it should afterwards be discovered that the endorsement was not made by the real payee, but by a person of the same name, still the drawer could not be entitled to a second suit. The plaintiff would be liable in a court of equity, and probably in a court of law, to the real payee, for money had and received to his use, after receiving the amount of the judgment; and he would have his remedy against the person who wrongfully endorsed to him and fraudulently passed himself for the real owner. The drawee in such a case could not ultimately be a sufferer. On the other hand, if the making of the note by the defen-

dant were allowed to be established by merely proving the signature to be the handwriting of a person of the same name as the defendant, when in truth the defendant was not the maker, but another one of the same name was, I think the defendant, after judgment, would be without remedy. The judgment would for ever conclude him, because he is a party to the suit. There is also another exception to the general rule. If the subscribing witness to a written instrument is dead, proof of his handwriting is held to be *prima facie* evidence of the execution. I think the present case does not come within either of these exceptions, or within any exception to the general rule. I therefore conclude, the handwriting to the affidavit should have been proved to be the defendant's, before he could be legally connected with the making of that instrument, or he should otherwise have been connected with it, by proving him a partner in the firm of William Guild & Co., of York, if the fact is so. To prove the description of this defendant to correspond with the description of the person who made the affidavit, would be nearly equivalent to proof of his handwriting, and perhaps might be sufficient. That was impracticable, because he has no description in this suit ; and it appears to me there was no other evidence of identity but a similarity of name, which, as I said before, I consider insufficient against a defendant in any action. It may be said there were other circumstances, such as the issuing of the attachment, the seizure of the goods, and the setting aside of the proceedings, and so there were ; but these circumstances, in my opinion, add nothing to the evidence of identity afforded by the sameness of name. They are in their nature foreign to this part of the subject. They had, perhaps, to shew that one Isaac Buchanan, of York, a partner in the firm of William Guild, jr., & Co., made the affidavits, because they wholly depend upon that fact, and naturally follow it. Still they do not sufficiently establish that fact ; but when they are adduced to prove that the defendant is the same man, then, in my opinion, they are wholly irrelevant. Just such circumstances might have occurred without his being the same man, and there-

fore they afford no legal evidence that he is. Mr. Starkie, in treating of circumstantial evidence, remarks : " It is essential that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive when it raises no more than a definite probability in favour of the fact, as compared with some definite probability against it, when the precise proposition can or cannot be ascertained. Such evidence is always insufficient, when assuming all to be proved which the evidence tends to prove ; some other hypothesis may still be true. For it is the actual exclusion of every other hypothesis which invests mere circumstances with the form of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favour of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be." In my view of the case, the affidavit and all the subsequent proceedings upon it, naturally go to shew that the defendant is not the same man who made the affidavit, because it does not appear he even resided at York, or belonged to the firm of William Guild, jr., & Co., still he may be the same man ; but the circumstances are strong enough to exclude the latter hypothesis ; they amount to no legal evidence. All the circumstantial evidence, therefore, except the similarity of name, should be considered as nothing, because they add nothing to the evidence afforded by that circumstance, nor do they afford any proof of themselves, for the reason just stated. In the case of Hennell v. Lyon, there was strong evidence of identity afforded by the description of the defendant, in the proceedings of two courts. The defendant, by his pleading, admitted his *name* and *description* to be the same on the record of each court, and this evidence of *admissions* by the defendant himself placed the matters beyond doubt, so far as to raise a natural presumption of the fact. The defendant in the present suit is described simply as Isaac Buchanan, without any addition whatever ; and this dissimilarity proves the essential difference between the two cases.

Without further attempting, however, to prove the insufficiency of such evidence from the general nature and effect of presumptive testimony, I will endeavour to shew it from the analogy of this case to others, and the opinions of the judges in the latter. In the case of *Hennell v. Lyon*, the proceedings in chancery and at law precisely tallied as to the name, description and character of the defendant, in both suits, and thereby afforded strong evidence of identity *per se*; in this case it is otherwise, and therefore some extrinsic evidence should be given. In the case of *Studdy v. Sanders et al.*, 2 D. & R. 347, determined about six years after *Hennel v. Lyon*, a copy of an answer was given in evidence, and a witness was called to prove that the defendant was the same person who filed the answer; and the only reason for calling the witness, in my opinion, was because the defendant was not described in the same manner in both actions. He was sued at law with one defendant, who was not joined with him in the equity suit. From the remarks of the court in banc, I certainly infer that it was considered necessary to call a witness to prove identity beyond what the proceedings in the two causes themselves afforded. In the case of *Dartnall v. Howard*, 1 R. & M. 169, which was tried the succeeding year, Abbot, C. J., clearly recognized the necessity of calling a witness to prove the defendant was the same person who put in the answer in chancery which was there adduced in evidence. The question there was, whether a witness could be asked his opinion as to the handwriting of the defendant to the original answer, when only a copy was produced in evidence. It was contended such a question could not be properly put to him without shewing him the original answer. The Chief Justice decided it might be put, and his remarks shew he thought such proof requisite. It is quite impossible to form any other conclusion, unless it could be supposed a judge would sit and gravely decide in favour of admitting evidence which he at the same time thought to be entirely useless. The absolute necessity of identifying a defendant with any document which is produced and used for the purpose of laying a foundation for obtaining a

verdict against him, is evidenced by almost every description of cases. When an action is brought on a promissory note, you must prove the handwriting of the defendant to the note, and that identifies him with the transaction. When an action of debt is brought on a bond, and the defendant pleads *non est factum*, it is not enough to prove by the subscribing witness that a person of the same name as the defendant executed the bond ; but you must also prove by the witness that he is personally acquainted with the defendant and knows his handwriting. If he is ignorant of the defendant and his style of writing, then his identity must be proved by some other witness.—B. N. P. 171 ; 4 Camp. 34 ; 2 Star. 239.

In the present case not guilty is pleaded ; and as it is an action which savours of criminal proceeding, I think the intendment of law is stronger in favour of the defendant than if he were sued in an action on a contract, and pleaded the general issue.

I am of opinion a new trial should be granted, for the insufficiency of the evidence. I do not think that the affidavits which were filed on the motion for a new trial, go the length of admitting the identity of the defendant. I am quite convinced they were not intended for that purpose ; and I feel unwilling to extend them beyond the scope and purpose for which they were designed, unless they were so worded as to render it *imperative*. They do not appear to be so, and I think they form no legal obstacle to allowing the objection taken to the evidence at *Nisi Prius* to have its full effect. If the defendant is really the same person who made the affidavit, supposing one was sworn, his handwriting might be proved, or he might be brought by evidence within the description set out in the affidavit, namely, that he is a merchant of York and a partner in the firm of William Gould, jr., & Co. Either mode, I incline to think, would be sufficient, and would come within the rule relative to the quality of evidence necessary to support the issue, namely, “the best evidence the nature of the case will admit.”

MACAULAY, J.—After the best consideration I have been

able to bestow upon this case, I feel constrained to adhere to the view I entertained at Nisi Prius, although at times I have hesitated, and have found some difficulty in removing, satisfactorily to my own mind, some of the considerations urged on behalf of the defence. I have not failed to reflect that the evidence respecting the identity of the defendant, as connected with the trespass, is exclusively documentary; that it was not proved *viva voce* that he at any time took personally any step in the matter, and that in cases savouring of a criminal complexion (as said in 16 Ea. 334, and 5 D. & R. 127, which, however, do not instance trespass to goods as partaking of that character) the evidence of identity is expected to be more specific than on other occasions of civil litigation. But upon reviewing the facts and course of this cause, and comparing them with the adjudged cases bearing upon the subject, I have already arrived at the conclusion that there appears sufficient to warrant the presumption or inference that the documents received in evidence are genuine, or copies of genuine originals, and that the affidavit of debt in the crown office should be assumed to be the genuine affidavit of the person who on the face of it would appear to be the deponent, until called in question by evidence on the part of the defendant, and no more would be established by the production of the original and proof of the signature subscribed. Production and proof of the identity of the deponent would not shew that the individual was the defendant in this cause, unless the identity of the defendant be previously or simultaneously ascertained or admitted.

The principal inquiry is, whether there was at the trial sufficient evidence to go to the jury to connect the defendant Buchanan with the trespass proved. Questions of identity depend upon circumstances. It is one question, whether an individual is a defendant in one suit; it is another question, whether the same person was plaintiff in another. Other obvious distinctions suggest themselves, but the foregoing include the only two applicable on the present occasion. If the first was intended to be objected, the question would be, who is the defendant in this suit?

In the cases I have consulted I do not find it disputed who the defendants were ; their identity as defendants seems uniformly assumed ; the real question being, how far the evidence identified and connected such persons with independent collateral proceedings. I did not understand at the trial that the identity of the defendant in this suit was doubtful or disputed, and if so, I see no ground for the objection. Names are given to identify individuals ; and although in society we do at times meet two or more persons of the same name, still in a court of law it is not to be presumed that there are more than one. The defendant in this cause is sued in the name of Isaac Buchanan. He ought to have pleaded a misnomer if not correctly named, but he has not done so ; he therefore admits that he is Isaac Buchanan, and we have heard of no other. His identity is no further ascertained upon the record ; no addition or place of residence is superadded ; he therefore merely admits on the record that he is Isaac Buchanan. In opening the plaintiff's case, his counsel necessarily added to the name the additional explanation that the defendant was one of the persons named in the documents about to be submitted, and a principal in the alleged proceedings under them. To render the plaintiff's case intelligible, it was incumbent on him to point out specifically who he represented the defendant to be. In the ulterior stage of the plaintiff's case, the defendant's counsel did not deny or call in question the identity of his client, as designated by the plaintiff's counsel ; he did not assert he was not the person supposed or represented ; but in the cross examination of the plaintiff's witnesses, and indeed throughout the plaintiff's case, it was assumed on both sides that he was such person. If, therefore, at the close of the plaintiff's case, the defendant's counsel had disputed it, I should have adverted to the whole course of the cause, and referred the conduct of the defence to the jury, as affording sufficient evidence of admission. When the defendant's counsel, in cross-examination, spoke of the defendant, he always spoke of him as the person described by the plaintiff's counsel, not only as respects Mr. Buchanan, but as respects Mr.

Malloch also. Indeed the very objections at Nisi Prius shew it. The first was, that the writ *prima facie* justified the levy being produced by the plaintiff; and that the rule for setting it aside, not having been served on either defendant, did not shew it quashed. Who could be meant as the defendants but those whom they had been alleged to be? and if they were strangers, how could the writ afford an objection, or *cui bono* would be the service of the rule on them? Parties in suits generally know each other very well, and it is not usual to call for evidence to identify the defendant as the defendant, although it is often requisite to identify and connect him with other proceedings. When the identity of the defendant, as the individual against whom the plaintiff professes and means to proceed, is questioned, it should be done in *limine*. The defendant's counsel cannot acquiesce in the character and description attributed to his client in the outset, test the plaintiff's proof under such an assumption, and then object that, though of the same name, he is not proved to have been the person meant. The objection, if urged with the expectation of being entertained, should be made promptly and *bona fide*, with a serious intention of relying upon it, and not be taken up as an afterthought at the end of the case. The more I reflect upon the whole course of this trial, the more I am satisfied there was abundance before the court and jury to shew who the defendant in this cause was. This brings me to the objection as I really understood it, namely, whether the evidence was sufficient to connect the defendant as a party to the proceedings in the former suit; whether, in other words, it proved the defendant in this suit to have been a plaintiff in that. The court at Nisi Prius knew judicially that, by the provisions of the attachment law, no writ could issue without the previous order of the court, or a judge, upon the application of the plaintiff, supported by an affidavit of debt and proof by affidavit of at least two witnesses, that the defendant was an absconding or concealed debtor, and it is a presumption of law that an officer does his duty till the contrary be shewn; consequently, that the clerk of the crown did not issue the writ produced

without competent authority, which authority the contents of the alleged affidavits were calculated to obtain; and with them the writ corresponded, in the names of all the parties, plaintiffs and defendant, and the sum specified.—10 B. & C. 216; 7 B. & C. 535; 2 M. & R. 238. The intervening time, between the day on which the affidavit purported to have been sworn and the receipt of the writ by the sheriff, admitted of the transmission of the several papers through the ordinary channel of communication. It also appeared that the former plaintiffs, including the defendant, were heard upon the return of the rule for setting aside the writ of attachment; and the reasonable inference, in the absence of anything to argue the contrary, would seem to be, that they were heard in the ineffectual support of the proceeding sought to be abrogated by the defendant. In the latter case, the defendant would be connected with the trespass by subsequent recognition, by the admission implied in his answering the rule to quash the process, that it had been sued out and enforced at his instance. The affidavits seem to have been received into the office in the usual course; and we know that the usual course is to receive them after being exhibited to the court or a judge, accompanied with the necessary order for the issue of the writ. There is then to establish the genuineness and authenticity of the documents in question—so far as to shew that a person, adopting the name and character of the defendant, made an affidavit of debt and caused the writ to be issued and executed, and that those documents all relate to the same suit—the following circumstances. The affidavits purport to be sworn before an officer duly authorized at Brockville, one, in the defendant's name, corresponding with the name and description of a partner of Buchanan & Co., or Guild & Co., and containing facts peculiarly within the knowledge of such a person, such affidavits being available in the procuration of an attachment and susceptible of no other apparent use in this court. These affidavits are afterwards found in the principal office from which alone such writs issue, and where they were seemingly received in the usual course; and no others are

attempted to be proved. In the usual course, they would only be received after perusal by the court or a judge, who would doubtless judicially recognize them as authentic before acting upon them, who would take judicial notice of the signature affixed to the jurat of their own officer, the commissioner, who would not of course recognize them as genuine, unless *prima facie* satisfied of their validity. In the usual course they would, if adopted as satisfactory by the court or judge applied to by the plaintiff or his attorney, agent, or counsel according to the statute, be accompanied by a fiat for the sealing of the warrant demanded. The issue of the warrant under the seal of the court; its transmission to the sheriff in the name of a known professional gentlemen, whose name as a commissioner is attached to the jurat, and so transmitted with instructions for its enforcement; the subsequent levy, followed by an application of the plaintiff to suppress the process, which was granted after hearing the opposite parties. All these steps are consistent with each other, and combine to support the presumption that some person representing one of the plaintiffs named in the former suit Isaac Buchanan, did cause the levy of the plaintiff's goods, as in evidence. On the other hand there is nothing offered to call in question the authenticity of the affidavits and subsequently written documents. No suggestion of fraud, deceit, or fabrication; no suggestion of any abuse practised in that name by some stranger; no surmise of corrupt or foul play is offered, to weaken the force of appearances. Under such considerations, as it seems to me, I did right in giving credence to the proceedings produced from the office of this court; and that it was competent for the court of Nisi Prius to leave it to a jury to presume that all things actually took place as they appeared, and that the copies of affidavits received in evidence exhibited the contents of originals made by and on the behalf of the person assuming the name of the defendant, and that they were used upon his application and received at his instance by the court, in the usual course, and constituted the foundation of the warrant. If so, the internal evidence sufficiently connects the defendant with

these proceedings. The defendant is Isaac Buchanan; and we know he is a person answering the description given of himself by the Isaac Buchanan who made the affidavit and instigated the proceedings in the former suit against the defendant. The affidavit, if not fraudulent or fabricated, was made by one who therein represents himself as the same person that the defendant is alleged to be, and all the subsequent steps correspond, and there is no discrepancy or variance. There is no incongruity, whatever appears is consistent, and all tends to the same result, namely to shew that the former suit was instituted by Isaac Buchanan, who described himself as a partner of the firm already mentioned, and who is the defendant in this cause. In addition to all which it may be remarked, that the court of Nisi Prius, being held by a judge of this court for the trial of issues of fact joined in this court, before which court and before which judge in point of fact the parties had appeared upon the rule to cancel the warrant, a privity might reasonably be held to subsist between the two tribunals, or the inferior court be regarded as an emanation of the superior; so that to a certain extent the cause might be considered, and the copies of the affidavits be regarded, as received and read in the same court and between some, though not all, of the same parties.—2 Bl. 1196; 1 M. & M. 109. In the latter event, the cases shew a more ready disposition in the judges to recognize copies of originals, such originals being produced from the usual place of deposit in the clerk's office of their own courts. It was within my knowledge judicially, though not in evidence at the trial, except circumstantially, that one of the former plaintiffs was the person described in the affidavit of debt. I learnt it from motions and discussions in term, when the attachment was set aside, as proved by the rule of court.

Had the original affidavit been produced and the signature been proved, it would only have shewn more conclusively by whom it was sworn. It would have shewn who was the former plaintiff, not who was the defendant in this cause, or that such person was the present defendant. Con-

sidering all things, I conceive the copies and subsequent proceedings in evidence sufficiently shew *prima facie* the former to have been made by and used on behalf of the person therein described, and that he is the defendant in this cause. It is unnecessary to go into adjudged cases. They establish that mere voluntary affidavits, not proved to have been used, are not admissible in evidence upon the bare production of the originals or examined copies ; but that if used, they are admissible especially in the same court and between the same parties, upon production and without proof of the originals or examined transcripts, and that when received they are adopted as genuine *prima facie*. The principles to be extracted from them sanction the view I took of the evidence in this case at Nisi Prius, in my humble opinion. The case in 1 B. & A. 183, is almost similar to the present. The defendant was sued as Lyon, administrator of Lyon, which, not being denied, stood admitted on the record. It stood admitted he was Lyon, and filled a special character as administrator. To prove his admissions in a suit in chancery, with other parties, a copy of the answer was produced, which purported to be by Lyon, administrator of Lyon. There was no other evidence of identity. The defendant was assumed to be the person described, viz., Lyon, as administrator, and the proceedings in chancery received there in the usual course corresponded with the name and special designations. In the present suit, the proceedings in the suit against the plaintiff mention the defendant in a special capacity, not as an administrator, but as a partner, and a resident at York, in the Home district. The record of Nisi Prius, shews only the admission of the name, without any addition. This addition is therefore not admitted on the record in this case, but in opening the cause he is more fully described, and the plaintiff's case proceeded through in the undenied assumption that the defendant answered the description given. In all other respects the cases are parallel ; and that decision with others bearing analogy to it, seem to me in favour of the plaintiff in this cause, and to preponderate in point of reason, practical utility and authority, over others that tend

to support opposing views. If it is admitted that the present defendant is a person answering the description given to the plaintiff Buchanan, in the former suit, then the cases are identical ; and that the present defendant is the individual supposed must for reasons already given be inferred. There is as satisfactory ground for inferring in this case that the affidavit of Isaac Buchanan was verified, used and received, in the usual course in this court, as that, in the case alluded to, the answer was so verified and received in the Court of Chancery.—3 Camp. 401 ; 2 Camp. 87-8 ; 16 Ea. 334 ; Bull, N. P. 14, 235 ; 2 D. & R. 384 ; 6 D. & R. 127 ; 4 B. & C. 25 ; 1 M. & M. 79, 109 ; 4 Stark. Ev. 918 ; 3 D. & R. 625 ; 14 Ea. 224 ; 1 H. Bl. 282 ; Burr. 330 ; 1 Camp. 196 ; 2 Camp. 87 ; 2 C & P. 296 ; Sid. 221 ; 7 T. R. 3 ; 5 Moore, 183 ; 3 B. & B. 27.

Per Cur.—Rule discharged.

SHERWOOD, J. dissentiente.

MILLER V. PALMER AND CARR.

Where, in trespass for cutting timber, the question was, in which of two townships there was an allowance for road, and the grants from the Crown not being very explicit, the plaintiff endeavoured to support his construction of the grant by parol evidence, which was rebutted by the defendant by parol testimony also, and the jury found for the defendant, the court held such finding right, and that parol evidence was admissible.

Trespass *quare clausum fregit*, brought to try the question as to the situation of the allowance for road between the townships of Willoughby and Bertie, in the district of Niagara. The plaintiff owns lots Nos. 11 and 12, in the township of Willoughby, the south ends of which abut upon Bertie, and either upon or near the south end of these lots the defendants cut a small quantity of timber. At the trial it was agreed to rest the case upon this point : If the allowance for road between Willoughby and Bertie is legally made out to be on the south side of the dividing line between those townships, that is, wholly in Bertie, then the verdict to be for the defendants ; but if wholly on the north side of that line, or partly on the north side and partly on the south, then the verdict to be for the plaintiff ; because if the allowance for road does lie wholly in Bertie,

then the defendant's lands, as proprietor of lots Nos. 11 and 12, in Willoughby, extend to the township line of Bertie, and the road would extend a chain beyond, and the defendant cut no timber further south than one chain from the township line, and therefore the timber cut must in that case have been either on his own land or upon the public way, and in either case no wrong would be done to the plaintiff. The government patents for the adjacent lands, in both townships, were produced, namely, one patent for lot No. 16, in the 5th and 6th concession Bertie, and for lot No. 10, in the south-east angle of Willoughby, dated 10th February, 1797; also another patent for lots Nos. 11 & 12, in the cross concession of Willoughby, dated 14th December, 1805. They did not satisfactorily determine the true situation of the road. The first patent describes as in Bertie part of the tract thereby granted, which lies on the south side of the line between the townships, but it embraces "an allowance for road," which is answered by the reservation for a highway between the 5th and 6th concessions, or which may also include the allowance between the townships. The patent of later date does not purport to include any allowance for road; but in approaching the township of Bertie, the line runs a certain number of chains, "more or less, to the allowance for road between the townships of Willoughby and Bertie." Mr. Jones, the deputy-surveyor, was called, and proved that he surveyed and laid out the township of Bertie; that he left an allowance for road on the south side of the division line which separates the townships. But no evidence was given of the original survey of Willoughby. Verbal proof of reputaiton was also given, and the jury found for the defendant.

Sherwood, J., who tried the cause, left it to them to say whether the public allowance for road was wholly within Bertie, and they found it was; and Sherwood, J., reported such finding was in accordance with his opinion.

A rule nisi for a new trial was obtained by *Sullivan*, in Michaelmas term last; and, in the same term, *Richardson* shewed cause.

ROBINSON, C. J.—I see no reason for disturbing the verdict. That there was and is a public allowance for road

between Bertie and Willoughby, was admitted by both parties. When I say *between*, I am not speaking precisely. I mean that a road was intended to be upon or immediately adjacent to the limit. I have examined the descriptions of lands in the several deeds produced; and upon considering them and the real evidence received at the trial, these questions present themselves: 1st. What conclusion do the descriptions lead to, considering them as proof of the intention of the government in regard to this highway. 2ndly. Do they leave the question in that state that parol evidence is admissible to solve it. 3rdly. If they do, then what does the parol evidence establish.

The plaintiff proved no actual possession in himself, and was therefore bound to shew his title to the *locus in quo*. He produced his patent for his lands, lot No. 16, in the 5th and 6th concessions of Bertie, which lie adjacent to the defendant's lands in Willoughby. The description in this patent does not clear up the point. It grants the lands, with an allowance for roads, leaving it uncertain what roads may be within the limits, and where, and if literally construed, would leave no road on or near the line dividing the townships, though both parties admit that there is a road there. The other patent also leaves the question of precise locality doubtful; and the plaintiff, feeling that the evidence of the patents is not clear, calls witnesses to give parol evidence in support of his construction. The defendant, on his part, does the same; and certainly the parol evidence strongly leads to the conclusion the jury came to, that the road lies wholly within Bertie. Now it surely cannot be permitted to the plaintiff to give parol evidence upon the very point in dispute, and then to turn round upon the defendant and insist that he shall not be permitted to rebut it by evidence of the same description.

But take it either way, if all the parol evidence is dismissed, still the point is not clear with the plaintiff upon the patents alone, and therefore the verdict should not be disturbed. The parol evidence was, I think, admissible and the weight of it supports the verdict.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Rule discharged

FORD V. LUSHER.

The property of a person who usually resides in the United States, but who engages in an undertaking in this country, employs persons here, and comes frequently to superintend their work, may be attached under the Absconding Debtor's Act.

In the month of November, 1832, the defendant, who is an inhabitant of Ogdensburg, in the state of New York, came to Prescott, in Upper Canada, and engaged the plaintiff, an inhabitant of this province, to construct a steam engine for him, and to fix it in a boat prepared to receive it. The work was proceeded in during the winter; and in the spring the defendant came from Ogdensburg to Prescott, every day for six or seven weeks, to superintend and observe the progress of the work. As soon as the engine was completed and placed in the boat, the defendant ceased to make these visits to Prescott, and remained in Ogdensburg, without paying or offering to pay the plaintiff for the work, or any part of it, and without making any arrangement for a further credit. The plaintiff and two other persons swear they verily believe he went away at that time, either to defraud his creditors or to avoid being arrested or served with process. The defendant does not deny either allegation. It does not appear that he has returned to the province since that time. On the 27th July last, a summons was issued by Mr. Justice Sherwood, calling upon the plaintiff to shew cause why the writ of attachment issued in this cause, and all subsequent proceedings, should not be set aside; which summons, upon hearing the parties, was discharged on the 7th August following. The original application was founded on the affidavits of James Ballantine and Miria Hilliard, made on the 6th July, and which stated that both plaintiff and defendant were citizens of the United States of America, and resided at Ogdensburg, and had been residing there for the last five years to the deponents' knowledge. That the defendant was an inn-keeper at Ogdensburg; and had not resided in the province for the last five years. It did not appear then that anything had been done under the attachment, nor was it proved by affidavit that any writ had ever issued. This summons was met in the first place by reference to the original affidavit

debt, made by the plaintiff on the 7th June, 1833, which was in the usual form. The attachment was ordered by Mr. Justice Macaulay, on the 12th June, 1833. There was also submitted the affidavit of the plaintiff, made the 2nd August, which stated that, during the last summer, he had purchased lands in Prescott, and that during the past winter he had erected an iron foundry in Prescott; where he had ever since carried on business. That he had removed from Ogdensburg to Prescott some time in November last, and had remained in the latter place the greater part of his time since that period, and considered himself an inhabitant of this province. That all the business that he had done on his own account, in the last nine months, had been done within the province, and that the contract upon which the above action was brought was made and carried into effect in this province. 2ndly. The affidavit of Samuel Hulbert, made the 2nd August, which stated that the plaintiff removed from Ogdensburg to Prescott during the preceding autumn, and had resided at the latter place during the greater part of his time, from November last. That he had purchased land and erected a foundry in Prescott, and carried on business there since November. That deponent considered plaintiff an inhabitant of this province; that he boarded with deponent, at the inn of Mr. Warner, in Prescott, during part of the winter and spring, and lodged in the said inn during the said time. That the contract upon which this action is brought was made by deponent, as agent for the plaintiff, with the defendant, at Prescott, and was carried into effect by the deponent, as agent for the plaintiff, at that place. That the defendant was in Prescott very often from November to March last, and that during the months of March and April last the defendant remained most of his time at Prescott, at least all the time during the day, employed in superintending the aforesaid work; and that as soon as the work was completed, according to the directions of the defendant, he left the province with the evident intention, as the deponent believes, of defrauding the plaintiff out of his just due. 3rdly. The affidavit of Elisha Lee, made the 23rd July last, which stated that, in

December last, he took the steam-boat Prescott apart, from the directions of the defendant, who was in Prescott, and ordered the work to be done : that the boat was his property, as deponent believed, and that during the months of March and April defendant remained the greater part of his time in Prescott, and was employed in superintending the said work ; and that immediately upon the completion thereof he left the province, and had kept himself away, as deponent believes, to defraud the plaintiff out of his just due : that deponent considered the debt contracted in Upper Canada, and that the said boat had been seized upon in this suit to satisfy a debt contracted by the defendant about repairing the same boat in this province.

In Michaelmas Term last, *Bidwell* obtained a rule nisi to set aside the writ of attachment for irregularity ; which motion was in effect an appeal from the decision of Mr. Justice Sherwood, at chambers, and offered some additional affidavits ; but it was contended, on behalf of the plaintiff, that the case could only be reviewed upon the facts shewn and the exceptions taken in the first instance. *Draper* shewed cause ; and the court being divided, judgment was delayed till this term.—7 T. R. 455; 1 Ea. 537; 1 H. Bl. 102; 5 Taunt. 850; 1 Chit. R. 126; 2 B. & A. 373.

ROBINSON, C. J.—I do not think, upon the facts disclosed on the whole of these affidavits, that a sufficient case is made out to warrant an attachment, according to the true spirit and meaning of the statute 2 Will. IV. c. 5. The first question is as to the propriety of overruling the decision of the judge who granted the attachment, as upon the affidavits submitted to him he had thought proper to do. I do not regard this application as in the nature of an appeal from his judgment, or from that of the learned judge who refused at chambers to interfere with the attachment. If it were so, then, although an attachment may have been ordered on a defective statement, and another judge declined interference with his adjudication from a feeling of delicacy while sitting at chambers, no relief could be had. Cases may be easily supposed where, though the affidavits are regular in form, yet, when the merits are disclosed, the

court would feel bound to interfere. Such was the case of *Guild et al. v. Spafford.*

On considering the merits of this case, and what appears from all the affidavits, my impression is, that the whole ground shewn and offered for the suing out this attachment is, that the defendant did not, after a particular period, return to this province, as he had been in the habit of doing before. He was a stated resident of the United States, coming to the province as long as a particular reason existed for it, and ceasing his return to the province when that reason ceased to exist ; but this is not absconding ; it is not secretly departing. For all that appears, he left the province as he had done every day for weeks before, and has not come back since. I see no difference between this and the case of the master of a steamboat running between any port in the United States and this province, leaving property behind him, who should not return as usual in his trips. I do not see how he can be said to abscond, to secretly depart from this province. If such a person were to conceal himself within the province, to defeat and avoid his creditors, the law would unquestionably apply to him ; but I cannot see how his departure, openly and under the same circumstances, as it had repeatedly taken place before, can be called absconding. It is not from the manner he left, but from the prolonged absence, that his absconding is inferred. But this is only not returning to the province from his usual place of residence ; and to an absence of that description I do not think the attachment law applies.

SHERWOOD, J.—The first question which naturally presents itself for consideration is this, whether an inhabitant of a foreign country, who comes into this province, contracts debts, departs this province with an intent to defraud his creditors, and leaves property here, is not within the provision of the act to afford means to attach the property of absconding debtors. If an inhabitant of the province should leave it under similar circumstances, there would be no doubt, I think, that his property might be attached by his creditors. The words of the statute make no distinction between debtors inhabiting this province, who attempt

to defraud their creditors, and those who come from a foreign country and embark in a similar design, and therefore there can be no legal distinction in reality, unless it arises from the reason of the thing or from necessary intendment of law. Now I can discover no good reason why the property of a fraudulent debtor, leaving the province to avoid service of process, should not be subject to the operation of the attachment law, although his place of residence is in a foreign country. His place of residence cannot change the nature of the act. His conduct is immoral wherever he lives, and therefore comes within the language and spirit of the statute. No parallel of latitude can change his intention in leaving the province, namely to defraud his creditors. The defendant seems to think the necessary intendment of law is, that he left this province merely to return to his place of residence, and for no other purpose. This position, however, is quite untenable. The affidavits on the part of the plaintiff go to prove an additional motive. There was no doubt he was anxious to return home; and it seems to be equally clear that he was desirous of avoiding the service of process, at the suit of the plaintiff. The existence of the last fact brings him, in my mind, within the letter and meaning of the statute; and that fact has not been opposed, except by a supposed probability that the inhabitant of a foreign country can have no other design, when he leaves the province under the circumstances of this case, but that of returning to his place of residence. When this case came before me, at chambers, I was convinced, by the contents of all the affidavits taken together, that one design of the defendant in leaving this province was to avoid the service of process at the suit of the plaintiff. When a debtor intentionally eludes the law in this manner, I think he may properly be termed an absconding debtor, notwithstanding there may be some concomitant and entirely different inducement existing in his mind at the same time, and which abstractedly considered would justify the act. Believing, as I do, that the defendant left the province to escape from justice, I am not solicitous to ascertain what other inducements he might have had.

This, in my opinion, is sufficient to uphold the attachment, which was directed to be issued under the statute.

MACAULAY, J.—The objections taken are: 1st. That the plaintiff was not an inhabitant of this province at the time of suing out the writ. 2ndly. That the defendant had not, immediately previous, nor for several years before, been a resident within the same, but a resident abroad; and could not therefore have withdrawn or absconded from the province, within the meaning of the act.

The act 2 Will. IV. ch. 5, for affording means of attaching the property of absconding debtors, enacts, that if any person, being *indebted* to an *inhabitant* of this province, shall *secretly depart* therefrom, or *keep concealed* within the same, it shall be lawful for *any person*, his servant or agent, to whom such absconding or concealed person is indebted in 5*l.* or upwards, to apply to the court in term, or to a judge in vacation, and make affidavit that the absconding or concealed person is indebted to him in the sum of 5*l.* or upwards, expressing the cause of action, and that he doth verily believe that the said absconding or concealed person hath departed the province, or is concealed within the same, with intent and design to defraud him and other creditors, if any there be, of their just due, or to avoid being arrested or served with process; which departure or concealment shall be proved to the satisfaction of such court or judge, by the oath or affidavit of at least two creditable witnesses, and upon such proof the court or judge shall direct the issue of a warrant of attachment. Provided, that if it shall appear, at any trial to be subsequently had, and be so certified by the judge presiding at such trial, that the person against whose effects such warrant issued had not been absconding or concealed at the time of issuing such warrant, then such person should recover his costs of the person suing out the said warrant, to be taxed by the court from which the warrant issues.

Upon the first exception, though the affidavits filed last term, if they could be looked at, render it more questionable, I am of opinion that it sufficiently appears the plaintiff was an inhabitant of this province within the meaning

of the act, so as to authorize his proceeding against the defendant by attachment at least, it is not sufficiently clear that he was not ; and were it otherwise, there would seem room to question the power of the court to interfere in this summary manner, the statute having enabled a judge in chambers to award the writ, his decision as to the ex parte proof of the absconding or concealment is final.—*I Doug.* 68. But admitting that imposition or abuse of the process of the court may be urged by the defendant, as has been done and admitted in other cases, it might not be competent to him to appeal from a decision in chambers to this court. Had the whole of the present case been originally laid before Mr. Justice Sherwood, he would still have ordered the writ, and such order could not afterwards be questioned here upon summary motion, without at least new matter to support it. In cases of perjury, the laws afford the means of criminal punishment ; and in cases of mistake or deception, the act enables the defendant to recover costs, if proceeded against as an absconding or concealed debtor, when in truth he was not absconding or concealed. At the same time, I am disposed to think the court may relieve on motion, when a clear case of fraud or perversion of the statute shall be established for criminal punishment ; and the allowance of costs may afford very inadequate redress to a party who, previously to his being admitted to defend, must give bail to the action entitling the plaintiff to demand the surrender of his person in satisfaction of the debt, which he will recover in judgment, however he might fail as to costs ; and which party, from never having absconded from the province, though resident without its limits, could not by any legal justifiable course have been rendered amenable to the jurisdiction of our courts. I am therefore prompted to dispose of the second and most material objection, as susceptible of consideration, upon an application like the present.

The statute was of course mainly designed to afford remedy to the inhabitants of this province, against persons indebted to them, who, having been resident herein, should have absconded or concealed themselves to avoid such

creditors ; but in acting under it, cases may be expected to arise hardly contemplated by the legislature in framing this law. Such cases must be disposed of by the courts according to the rules and principles of legal construction, and such analogies as may be suggested to aid the interpretation and application of the law. It is contended, that no one but a stated resident can be an absconding or concealed debtor, within the meaning of the act ; but that is not made out to my satisfaction. It is, I believe, settled, that if two foreigners be in this province casually and for temporary purposes, and the one should owe the other upon an ordinary simple contract debt contracted abroad, it would be open to the creditor to resort to the laws of this province against the debtor, and to issue any process that a subject might obtain against a subject for a debt accruing here, even a bailable writ of *ca. re.* upon the usual affidavit, should the creditor apprehend that the debtor would depart the province without paying him, and honestly make oath in proper form to that effect. The reasons are, that the debt follows the person ; that being here, the debtor becomes amenable to the process of our courts ; and in all cases where it is honestly apprehended that a person within such jurisdiction will depart without satisfying a creditor, seeking to enforce his remedy in this province, it becomes open to the latter to restrain his exit by an effectual check. Being indebted within the jurisdiction and about to depart the debtor is liable to arrest, without regard to the place of his settled residence, or of the contract, if of the ordinary description, admitting of the proceeding by arrest. A similar principle seems to me applicable to the attachment law. If a foreign resident, being casually in the province, under such circumstances that an inhabitant thereof, to whom he stood indebted, could arrest him, and on the apprehension of being arrested or served with process from our courts, should, in order to avoid the same, withdraw or conceal himself, a withdrawal or concealment, proceeding from such fears and actuated by such motives, would in my opinion constitute an absconding or concealment within the act, however the fugitive party may, in absconding from

the province, have gone to his usual residence in the United States. The question is, *quo animo* did he last depart the province—was it to return home merely, or was it hastened by a dread of detention under legal process? In the former case, it could be no absconding; in the latter case, the creditor might well assert, in the language of the statute, that he had departed the province with intent and design to avoid being arrested or served with process. If this view be correct, then the only question in the present case is, not where was the defendant's permanent residence, but whether, when he left the province, he withdrew in the ordinary course of his business, or hastened his departure and actually did remove himself for the purpose of evading arrest or service of process. In the latter event, the plaintiff was entitled to regard him as an absconding debtor and to attach his effects accordingly. In looking at the affidavits, it will not be found that the defendant denies his having departed from the motives imputed to him by the plaintiff, but he appears to rest his claim for relief on the circumstance that his usual residence was abroad, and that at all times his visits to Canada were casual and temporary, and that being accustomed to come and go frequently, as his business required, he could not be said to have absconded at one time more than at another. The plaintiff and several witnesses assert on oath their belief that he did depart in order to escape arrest or service of process, and it is not contradicted.

Upon an indictment for perjury (which may be resorted to), the material inquiry would be, whether the defendant did withdraw or not for the purpose alleged in the affidavits exhibited by the plaintiff, not whether his general or fixed residence was in Upper Canada or Ogdensburg. It does not appear that the defendant did not withdraw from the motives imputed. In addition to the positive assertions of several persons, there are in the matters disclosed some circumstances calculated to strengthen the inference, with little to rebut it but the naked fact that his domicile was in the State of New York, and his visits to Canada very frequent previously, though not prolonged beyond the space of a day at any one time. The discontinuance of these

visits is sought to be attributed, on the defendant's part, to the completion of the work which he was accustomed to come over to superintend, and, on the plaintiff's part, to the fraudulent design of defeating the plaintiff's just claim. It is not explained, on either side, why a remedy against the steamboat seized could not be enforced at Ogdensburg as well as here; but on a careful consideration of the case, I do not find displayed such an abuse of the process of the court as would warrant me in quashing the plaintiff's proceedings, on the ground of the irregularity alleged. If the affidavits filed last term could be regarded, I apprehend they would not alter the case. They seem principally designed to shew that the plaintiff was not an inhabitant of this province, but of the United States, and that the defendant was also a stated resident in the latter; but they do not bear upon the gist of the plaintiff's original affidavits, that the defendant had departed the province to avoid being arrested or served with process. Upon the facts advanced on both sides, it remains unequivocal *quo animo* he did depart; but the positive belief asserted by the plaintiff, is not contradicted or denied by the defendant throughout.

Per Cur.—Rule discharged.

ROBINSON, C. J.—*dissentiente.*

IN RE JUDGE OF THE DISTRICT COURT OF THE DISTRICT OF NIAGARA.

This court will not order an attachment against a judge of a district court, for not obeying a certiorari, unless it be shewn clearly that he acted contumaciously.

An action of assumpsit was depending in the District Court of the District of Niagara, wherein one Bryant was plaintiff and one Shaw defendant. The defendant having a material witness living in the district of London, desired to remove the cause into this court, not having any means of compelling his witness to attend at the District Court. He took out a certiorari on the 6th July, and served it on the judge in court on the 10th, after the cause was called on, but before any juror was sworn. The certiorari is to remove proceedings in a cause "between Joseph Shaw and

Thomas Bryant, of a plea of trespass on the case upon promises." The judge having received the certiorari, nevertheless proceeded, tried the cause and took a verdict. And now he returned that the writ was served upon him when the cause of Bryant plaintiff and Shaw defendant was called on, and whilst the jury to try that cause were impanelling ; that in the period given to determine, he considered that the writ did not refer to a cause wherein Bryant was plaintiff and Shaw defendant, and that he proceeded in the cause and took a verdict for the plaintiff.

O'Reilly moved for an attachment against him for disobeying the writ. The opinion of the court was given by

ROBINSON, C. J.—Proceeding after the service of a writ of certiorari is clearly error, and by this means the party can obtain his remedy ; but an attachment would not go, unless in the opinion of the court there was a designed contempt.—12 Mod. 643 ; Cro. Car. 261 ; 3 Mod. 85 ; 1 Mod. 195.

As to a writ of error, I am not able to say that any can issue, otherwise than under the great seal ; none can go from this court. At least, I now think so. Our statute of 1822 gives no power that would extend to it, nor does the District Court Act of 1822. At one time, an undefined power was given to this court, by a provincial statute of 1797 ; but that is no longer in force. A writ of error, I think, is the specific remedy for the injury the defendant Shaw complains of. This court has recognized a writ of error under the great seal.—Randall v. Boulton, in error. We are not to assume that Shaw would find difficulty in obtaining one ; but were it otherwise, we cannot make a new law for his case ; and I am not of opinion that we should be warranted in attaching the judge, merely in order to give him a remedy, by imposing a fine or insisting on the judge compensating him for the injury. He may at last turn out to have sustained no substantial injury, for possibly he may have no just or legal defence, and the plaintiff may ultimately shew himself entitled to a verdict. But at all events the judge is not to be punished, unless the court think that he acted contumaciously, in order to vex

the party or to shew contempt for the court. The certiorari might have been delivered to the judge before he was actually entering on the cause; and if reserved till that moment, and the judge is at a loss what to do from a supposed informality in the writ, what he does should not be too harshly judged of.

Per Cur.—Rule for attachment discharged without costs.

FORSYTH V. HARTWELL ET AL.

It is irregular to issue process from the principal office, and to give the defendant notice to appear at a deputy's office in an outer district.

Bidwell obtained a rule nisi to set aside the service of the writ in this cause for irregularity. The writ issued from the Crown office in York, and the notice endorsed on the copy was to appear at the office of the deputy clerk of the crown for the district of Johnstown.

Draper shewed cause; contending that there could be no prejudice to the defendant, but rather a convenience, as he was called upon to appear in the office of the district where he resided.

Per Cur.—This is against the express words of the statute of 1822, and they make the rule absolute.

COIT V. WING.

Court will order a *ca. sa.* on an affidavit sworn before a judge K. B. of Montreal, his signature being verified by affidavit sworn here.

The court, on motion of *Draper*, ordered a writ of *ca. sa.* to issue in this cause. The affidavit on which the application was founded was in the ordinary form, but was taken before a judge of the Court of King's Bench for the district of Montreal, in Lower Canada. His signature was verified by an affidavit taken before a commissioner of this court, and the court granted the motion.

BRADBURY V. LOWRY.

The sureties in bond, required under the attachment law previous to issuing execution, must reside in this province.

Draper moved for leave to issue a *fi. fa.* in this cause

against the goods of the defendant, an absconding debtor, and brought into court a bond, with two responsible sureties, executed by the plaintiff. An affidavit of the due execution, and also of the sufficiency of the sureties, was likewise produced; but it appearing that both the sureties resided in Lower Canada, which was the plaintiff's place of residence, the court refused the application.

SMART V. DEMEREA.

When proceedings are defective in point of form, and are objected to on that account, copies must be produced in support of the application.

Motion to set aside proceedings for alleged defects in the affidavit to hold to bail and the writ of *ca. sa.*, and, on shewing cause, a preliminary objection was taken that when an objection of this sort is raised, copies of the affidavit and writ in which the alleged defects exist should be produced in support of it; and the court being of that opinion discharged the rule.

Sullivan for plaintiff. *Draper* for defendant.

In this term, the following gentlemen were called to the bar and sworn in:—

Edmund Murney, John Law, Adam Henry Meyer,
Henry Smith, junior, Esquires.

JNO. B. ROBINSON, C. J.
L. P. SHERWOOD, J.
J. H. MACAULAY, J.

KING'S BENCH.

EASTER TERM, 4TH WILLIAM IV.

SPAFFORD V. SHERWOOD, SHERIFF OF JOHNSTOWN.

In case against a sheriff for not conveying lands sold at public auction under the assessment law, the declaration stated the sale on the 22nd July, 1830, and that, "afterwards, and at the expiration of twelve calendar months from the time of such sale, to wit, on the 22nd July, 1831," the plaintiff demanded a deed: *Held* good on general demurrer. *Held also*, that it was unnecessary to aver that there was no sufficient distress on the lands, or that a deed was tendered to the sheriff for execution.

Case against the sheriff of the district of Johnstown, for nonfeasance in refusing to convey to the plaintiff a lot of land sold by the defendant, as sheriff, to pay arrears of assessment, and of which the plaintiff became the purchaser at public auction.

The declaration set forth, that the assessment upon the land in question had been unpaid for eight years, and that the land had been returned accordingly by the treasurer of the district, pursuant to the statute; that the clerk of the peace had thereupon made out a writ for levying the said assessment, by the sale of such portion of the land as might be sufficient for that purpose, provided there should be no distress upon the land, from which the assessment, &c., could be levied. That upon such writ being delivered to the defendant, he did, on the 22nd July, 1830, expose the land to sale by public auction, and the plaintiff became the purchaser: that the plaintiff, on the same day, paid to the defendant the amount bid, and that the defendant accepted the same: that afterwards, and at the expiration of twelve calendar months from the time of such sale, to wit, on the 22nd July, 1831, the said land not having been redeemed pursuant to the form of the statute, the plaintiff demanded a conveyance of the said land so sold to him; but the said defendant to execute the same wholly neglected, and refused to the plaintiff's damage of 200*l.* The defendant demurred generally; and the demurrer was argued last term by *Butwell* for the plaintiff, and *Draper* for the defendant.

ROBINSON, C. J.—We are of opinion that the declaration is sufficient, and the plaintiff entitled to judgment. Upon

the first exception, that the year for redemption had not fully expired, and that the deed was therefore demanded too soon : this is grounded on an assumption that the twelve calendar months were not at an end till the 23rd July ; but clearly the plaintiff is not held to the precise day stated under a *videlicet* in his declaration. He has alleged that it was after the expiration of twelve calendar months that he demanded the deed, which is all that is necessary ; and if his evidence supports that allegation, of course it will suffice, although the day proved may be different from that on which the demand is alleged to have been made. Upon the second exception, that it is not stated that there was no distress on the premises : although the sheriff's right to sell the land depends upon that fact, we are of opinion that, in the first instance at least, the want of distress must be presumed against the defendant. By his selling under a writ which gave him no authority, unless in default of any distress, he has admitted that there was no distress, and relieved the plaintiff from the necessity of proving it. He cannot set up a mere presumption that his own act may have been illegal. If in truth there was a distress, so that he had no right to sell, he might raise the question, upon the trial, whether he could not prove that fact as one that disabled him from making a title to the land, but *prima facie* we are to take it as against him that he pursued his authority.

Upon the third exception, that the sale, according to the time averred in the declaration, took place one day earlier than it could legally do, it seems to be founded in misapprehension ; for in fact seven months, according to the declaration, intervened between the delivery of the writ to the sheriff and the sale.

Upon the fourth exception, that it was necessary to aver that the plaintiff tendered a conveyance to the defendant to be executed, and not sufficient to aver that he demanded a conveyance : this objection was probably the one most relied upon, but it does not appear to us to be tenable. By the natural construction, and according to the spirit of the 18th and 19th sections of the statute 6 Geo. IV. it seems

that it is incumbent on the sheriff to make, that is to prepare, the conveyance of which the statute prescribes the form ; he is to deliver it to the party, and to make no charge for it ; and he is to deliver to the registrar of the county (before he deliver any conveyance to the purchaser) a certificate, stating the particulars and date of such conveyance. It is reasonable to infer, from the language of these clauses, that the sheriff, being aided by the legislature by having a short form of conveyance devised for the purpose, was to have such a conveyance ready to be executed when demanded by the party ; and the provision, that he was to make no specific charge, confirms this deduction ; for if it was incumbent on the purchaser to prepare the conveyance, there would be little sense in this restriction of the expense. But, moreover, in the case of Bulker v. Bulstrode, this very point was adjudged ; and it was decided that a party who was bound to seal and *execute* a release was bound also to make it. The objection there was that the other party ought to tender the release, as the condition was not to "make," only to seal and execute. But the court say "he is bound to do it without a tender ;" and the word "execute," or the word "seal," comprehends the making. —*I Mod.* 104 ; *I Lev.* 44 ; *2 Lev.* 55 ; *1 Vent.* 255 ; *T. Ray.* 232 ; *3 Keb.* 373 ; *1 H. Bl.* 374 ; *1 Roll. Ab.* 465 ; *2 Lord Ray.* 1095.

Per Cur.—Judgment for plaintiff on demurrer.

GRANT V. MCLEAN, ESQUIRE, SHERIFF.

In trespass against a sheriff for seizing the goods of the plaintiff under an attachment, issued under the Absconding Debtors' Act against the goods of a third party, by whom they had been sold to the plaintiff before the attachment, the defence was that the sale was fraudulent and void against creditors under *13 Eliz. ch. 5*, but the sheriff did not prove that any debt had been due from the absconding debtor to the attachment creditor : *Held*, that without the proof of this his justification was incomplete, and that the plaintiff would be entitled to recover.

Trespass against the defendant for seizing and taking the defendant's goods. It appeared at the trial, before Macaulay, J., at the last Johnstown assizes, that the goods in question had been the property of one Lowry, an absconding debtor, against whose effects the defendant had a writ

of attachment, under which he made the seizure complained of. The goods had, it appeared, been sold and transferred by Lowry to the plaintiff, immediately before he absconded; and the question upon the merits was, whether this transfer and delivery as proved was founded upon good consideration and *bona fide*, or fraudulent under the statute 13th Eliz. c. 5, as against creditors. There was evidence to prove the transaction fraudulent, and the jury so found. But a new trial was moved for by *Bidwell*, for the plaintiff, in last Michaelmas, and a rule nisi granted for misdirection and upon points raised at the trial. 1st. That this action lies, owing to the excess of the levy of goods, to the value of 450*l.* 19*s.* 4*d.*, having been seized under an attachment issued out of a district court for a much less sum. 2ndly. That a sale and delivery from Lowry to the plaintiff being proved, such transaction being valid between the parties, and *prima facie* good as to all the world, and liable to be declared void only in favour of creditors ; and the goods not being, at the time of the issue of the writ or the seizure, in the possession of Lowry, the alleged defendant, but in the possession of plaintiff, as his vendee, for valuable consideration, it was incumbent upon the defendant, in support of his justification, to prove by a judgment of record, or at least by sufficient evidence, that the parties at whose suit the levy was made were, at the time of the sale to the plaintiff and of the seizure, creditors of Lowry, the fugitive debtor. Upon the defence, the defendant merely proved the writ of attachment, without producing or proving any affidavit of debt or shewing in any other way that Bradbury, the defendant in that suit, was a creditor of Lowry, the alleged debtor. The case was argued in Hilary Term last, by *Bidwell* for the plaintiff and *Draper* for the defendant.

ROBINSON, C. J.—In this case the jury upon the evidence found a verdict for the defendant. No legal questions were reserved at the trial ; and as the jury were, in my opinion, supported in their conclusion by law and evidence, I should be contented to let their verdict remain undisturbed and not continue the litigation for the purpose of enabling the plaintiff to recover damages, as the owner of goods lately

belonging to an absconding trader, and claimed by him under a sale, which, if perfected at all, was manifestly conclusive, and made, as I have no doubt, for defeating the process of this court. I have the misfortune, however, to differ from my brothers, in some points, upon the construction of the statute 13 Eliz. ch. 5, against fraudulent conveyances, and the spirit in which it is to be carried into effect ; and in deference to their opinion, and also because I should prefer that the jury had, at the last trial, been required to express their conclusion more specifically upon the character of this transaction, I concur with my brothers in granting a new trial ; and of course the sheriff can, if he pleases, avail himself of the opportunity of proving, upon the second trial, the existence of a debt to Bradbury as the foundation of the attachment, provided that shall be in his power. If my brothers shall continue of the opinion which I understand them now to entertain, it will of course be necessary for him to do so. In the meantime, as the case is one of interest from the principles it involves, I will endeavour to explain the light in which I view it at present ; but if, in the future progress of this cause, it becomes necessary to pronounce conclusively upon the necessity of proving a debt due to the prosecutor of an attachment upon a case like the present, it is not impossible that, upon further consideration, I may bring myself to think the opinion of my brothers the more correct one, and I shall be happy if our views of the general question can be ultimately reconciled.

The facts of the case have been fully reported by my learned brother, who tried the cause ; and from these facts it is clear that this is not the case of a voluntary conveyance, made void by the statute, as against creditors, simply because it is voluntary. It is an alleged sale of goods, for which sale there was some evidence of consideration ; the sale was to a stranger ; not professed to be a voluntary gift and not proved to have been without consideration.

Doubtless a man may *bona fide* sell his goods at any time before execution ; and such a sale for consideration, if *bona fide* made as between him and the vendee, will be conclusive, and defeat the plaintiff of his remedy. But it is said

this was not a *bona fide* sale, but a “*feigned, covinous and fraudulent alienation or conveyance* of his goods and chattels, devised and contrived of fraud, covin and collusion, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, debts, &c.”—Stat. 13 Eliz. ch. 5.

I think, on the evidence, there was ground to contend this before the jury. There are many circumstances to throw suspicion upon it. It was much out of the course of ordinary sales of goods. 1st. The sale not openly transacted, nor heard of till it was said to be completed; and then Grant, a lawyer living in Ogdensburg, comes over on a Saturday evening, and the debtor says to his former clerk *here* is now the owner of my goods. A lawyer in a foreign country coming over to this province to buy a whole assortment of goods, remnants and all, and further, notes, accounts, &c., which he afterwards professed he was taking to Kingston to sell: a strange transaction for an American lawyer to have in this province. 2ndly. Everything was sold, every trifling article included, and no steps shewn to have been taken by Grant to ascertain whether the goods agreed with the schedule. 3rdly. They were packed up on a *Sunday* (the next day). 4thly. The vendor Lowry absconded on that day. 5thly. Nothing shewn to have led to this dealing between the parties, thereby leaving unrebutted any unfavourable inferences. 6thly. Grant makes a bar-keeper in a tavern at Prescott his agent, to take care of and remove these goods. 7thly. This agent swears he endeavoured, in removing them, to avoid their being taken by creditors; and the jury may refer that intent to an antecedent cause, if the facts from the first were suspicious. 8thly. He swears, before he removed them, he feared this attachment, or rather that an attachment would come against them at the suit of Bradbury; and he details the contrivances used at night in removing these goods, first to the American shore, being careful, however, not to land them there, and afterwards attaching them to a steamboat, in the night, by which they were towed to Kingston; and these goods, it is to be remembered, were all this while packed

in cases marked with Lowry's mark, and were seized by the sheriff in that state, not being at the time in possession of the plaintiff himself.

It is not necessary to prove a *debt* existing before the sale ; a collusive and covinous sale, if the jury find such, is void, not against the vendor, but against *all creditors* and others intended to be defrauded, and this embraces *subsequent creditors* ; so, if this debt was contracted afterwards it would do. The agent said he wished to avoid *this* debt and another *debt* in removing the goods—all admissions that there were debts before the sheriff seized ; and at any rate, if the jury find it a covinous contrivance and not a *bona fide* sale, the sheriff had a right to say, under the statute 13 Eliz., that it was void as against the plaintiff in the attachment, whose suit would be clearly disturbed, delayed and hindered by it ; and if so, the statute applies, whether a debt should turn out to be due to Bradbury or not.

Martin v. Podger, 2 W. Bl. 701, seems to me express in favour of this view. There no judgment was proved at the trial, but the bailiffs produced only the *fi. fa.* under which they sold. The plaintiff, claiming under a previous bill of sale from the defendant in the *fi. fa.*, recovered a verdict and 28*l.* damages, subject to the question whether the bailiffs should not have shewn a judgment. The court recognised it as a general principle, that, as against third parties, the sheriffs or bailiffs were bound to shew a judgment to support the *fi. fa.* "But" (says Lord Mansfield) "as the goods were in the possession of the son, I think the judge should *have left it to the jury* whether under these circumstances the father had any *right to recover*. Therefore I incline that a new trial should be granted" And afterwards, on shewing cause, when Sergeant Heath urged that the sale was good against all but creditors, and that, as no judgment was produced, there was no proof of any debt *bona fide* due, the court say that they had received a report from Bathurst, J., who tried the cause, which shewed the circumstances of the bill of sale to have been extremely suspicious, and they were unanimous that the judge ought to *have left it to the jury* upon the ground of fraud, that is,

he ought to have left it thus to them on the former trial, although it is certain the bailiffs gave no evidence of the judgment. Burrows' (2631) report of the same case is to the same effect, but even more strongly expressed. The court are there made to say, that when the action is by a third party, the rule is that the judgment must be shewn. "But the whole court were likewise of opinion that the recovery in this action, brought by the father upon a fraudulent bill of sale, merely colourable, not a real fair transaction, but leaving the possession in the son, and fraudulent even at common law, independent of the statute 13 Eliz., was shameful, unreasonable, and against justice, and that the verdict ought not to stand. It might have been left to the jury, whether the plaintiff was in possession of the goods, or not. It is a matter fit to be left to a jury; but it is a shameful thing to set up this fraudulent colourable sale as a real conveyance of the property." And it is clearly said in many cases, that the vendor continuing in possession is only one of the *indicia* of fraud, and not always conclusive; there may be others stronger; and in this case there cannot be, I think, a shadow of doubt that the sale was fraudulent.—3 T. R. 621.

I infer clearly, from the case of Martin v. Podger, as reported by Blackstone and by Burrows, that if the jury at the first trial had, under the judge's direction, found for the defendant, the verdict would have been sanctioned, though no judgment was proved.

In 1 Phil. Ev. 391, it is laid down in broad terms, and the principle is repeated in nearly the same words in several treatises, that when the sheriff takes in execution goods which at the time are not in the possession of the debtor, but of a third party, intending to justify on the ground of a fraudulent alienation, void under the 13 Eliz. ch. 5, it will be necessary for him to shew a judgment. Now the statute clearly requires no such thing in terms, for the sale ought to be equally fraudulent and void under that statute, if collusively made, though no judgment was recovered. All therefore that can be meant, is that if a creditor by judgment seeks to invalidate a sale under the statute, which, being

bona fide made, is only made void by the statute, and that as against a creditor, he must prove his judgment. The question for the jury (under the 13 Eliz. ch. 5) was whether the pretended "alienation" of all the goods was not contrived and devised of fraud, covin or collusion, to delay, hinder, or defraud creditors (not any particular creditor) and others, of their just and lawful actions, suits, debts, &c., to the let and hindrance of the due course and execution of law and justice. "If it was then as against that person whose suit, action, &c., by such fraudulent practice, shall or might be in any wise disturbed, hindered, delayed or defrauded, the alienation so fraudulently made shall be clearly and utterly void, frustrate, and of none effect." Now I am satisfied the jury cannot have doubted, and that no person of ordinary understanding can doubt, that this pretended alienation was not made *bona fide*, but was "contrived and devised of fraud, covin and collusion;" and for what intelligible motive, if not to defraud creditors or others, or hinder or delay them in their actions? Of many facts it may be said *res ipsa loquitur*; and moreover, if the jury really could for a moment be in doubt and driven to conjecture, the evidence of the pretended purchaser's own agent would effectually dispel their doubt by declaring the motive. He swore that he was afraid of the goods being seized for debts, and mentions the creditor's name whose vigilance he wished to avoid; and particularly declares that he was afraid of an attachment at the suit of the very person who sued out the one which was proved before the jury to have issued. Now as to proving the existence of a judgment creditor, that is out of the question; because it does not appear there was any, nor is it necessary there should have been. A collusive sale, made to deceive a creditor of any kind, is utterly void against that creditor and against other creditors, even such as were not creditors till after the fraudulent alienation. That has been repeatedly decided. That there were creditors is evident enough. The debtor had absconded from them on a Sunday, after making this sale on the Saturday night; and the pretended buyer's agent was using all imaginable art (according to

his own confession) to get the goods clear from them too. Then if this were a fraudulent sale, to defeat or delay any creditor, as I think the jury were abundantly warranted in concluding, it is utterly void as against any person whose action or suit is delayed or hindered by it. The person who sued out this attachment is such a person, in my opinion, whether his action turn out ultimately to be well founded or not; for he clearly would be disturbed, delayed or hindered, by paying regard to this fraudulent sale; and the vendee, by advancing his pretended purchase for that purpose, has brought himself within the penalty of the act, —1 Leon. 47. The sheriff cannot tell whether his cause of action is just and legal or not, and has no means of proving it. He neither knows the nature of his demand nor the witnesses; and nothing is more possible than that even the plaintiff himself may be honestly and properly urging a claim doubtful in its nature, which the deliberate judgment of the highest tribunal, after full consideration of the case, can alone settle. In the mean time, the intent of the statute 13 Eliz. ch. 5, in my opinion, was, that he should not be delayed or disturbed in his action, brought for asserting that right. In the words of the statute, such contrivances as these "tend to the let and hindrance of the due course and execution of law and justice, and to the overthrow of all true and plain dealing between man and man." In the language of the court, in *Martin v. Podger*, "it was and it is a shameful thing to set up this fraudulent colourable sale as a real conveyance of the property." And unless we find fault with the conclusion of the jury on the facts proved to them, we ought not, in my judgment, to allow such a transaction to work impediment or hindrance to any suitor, much less to be made the ground of an action against the sheriff for obeying the process of the court. *Exturpi causa non oritur actio.*—Cowp. 343. The sheriff here is not a stranger. As between Grant and Lowry, the sale may be good; but within the purview of the Absconding Debtor's Act, I conceive these goods to be assets of the absconding debtor, to be treated as if they were still in the possession of the debtor, who has withdrawn from the reach of process

and left his creditors no other means of urging their demands than by the step which the plaintiff in this attachment has taken here.—Latch. 222; 2 Roll. Rep. 492. The cases in the margin, I consider, confirm this view of the case.

We must be careful to discriminate, and to arrive at a clear view of the statutes of Elizabeth, their intention and effect. Since their passing, there are two classes of cases in which questions may arise such as that now before us. Before these statutes, a person indebted could freely dispose of his goods until an execution was taken out; that bound them in those days from the teste; but afterwards, goods were only made liable from the delivery of the writ to the sheriff. Clearly, however, if he chose to give his goods or his lands to a son, or a father, instead of paying his debts with them, or instead of allowing them to remain and to abide the issuing of an execution, though his conduct might not be honorable or honest, his gift was legal. The statutes of Elizabeth have altered this, and such gifts shall not now prejudice the right of a creditor; but as a voluntary gift of that nature, if really made *bona fide*, was not covinous or fraudulent, a creditor, before he can treat it as void, must be prepared to show that he *is* a creditor, and he cannot, even in equity, move for relief till he shews that he stands in that relation. Many of the cases in the books are clearly of this class; and others may have been so, though the facts are not so stated as to make that point appear.

The case of Lake v. Billows, 1 Ld. Ray., which is made the foundation of the general rule, that the sheriff defending against a third person must shew a copy of the judgment, may have been a case only made fraudulent under the statute of Elizabeth; that is, there may have been no covinous contrivance fraudulent at common law. So also Sander's case, Holt 327 (not now regarded as authority to the extent it goes), in requiring the consideration of a judgment to be proved, may have been a case of voluntary conveyance only, made void against creditors by the statute, and not a fraudulent unreal transaction void at common law. The same remark may be extended to a multitude of other

cases ; and when it is said in them that the sheriff must prove a judgment, I do not take that to shew that the sheriff must in all cases shew a judgment, or a debt due to the plaintiff for whom he is enforcing the process of law, even where he has been met by nothing but a pretended sale, contrived by gross collusion to defeat creditors ; not intended to work a change of property between the parties, but a mere colourable transaction, thou h accompanied by a change of possession, the better to cover the fraud. I am convinced, by what the court say in Martin v. Podger, that the distinction I now draw was intended to be recognized in that case ; and so Mr. Starkie, in his Treatise on Evidence, considers, for he says, " If the assignment or delivery of possession were merely colourable, and the property still remained in the debtor against whose goods the execution issued, the sheriff would it seems be entitled to a verdict without proving a judgment, the plaintiff having no property in the goods ;" and he cites Martin v. Podger to support this distinction. The cases of Cadogan v. Kennett, Cowl. 433, and of Martin v. Pewtress, 4 Burr. 2477, and particularly the latter, contain abundant proof, to my conviction, that the court clearly recognize the distinction between sales or gifts made *bona fide*, and intended to change the property, and between feigned and colourable transactions, merely contrived with the intent and for no other purpose than to defeat and delay creditors ; transactions, in short, set up as real for a particular purpose only, and that fraudulent, whereas to general intent and for other purposes they were not designed to have effect.

The common law allowed men the right, although indebted, to sell or give these goods before execution issued, and to restrain the abuse of this right, a statute was necessary ; but it never gave them a right to set up a sale as real, and claim under it as real against a third party, when in truth it was only collusive, false and deceitful—a mere pretended sale.

It all turns upon the word "feigned" used in the statute. As against third parties, a feigned sale is no sale ; and it was proper, in the words of Lord Mansfield, in Martin v.

Pewtress, "to be left to the jury on the point of fraud, affecting and annulling the whole transaction." "A trader," his lordship adds, "cannot alter the property of goods by a criminal fraudulent transaction, to the prejudice of his creditors." In the same case, Mr. J. Yates says, "If fraudulent (meaning at common law), it cannot alter the property. It may be enquired whether it was a sale and transfer of the property, and the jury have considered it not so." And he concludes in words very strongly applying here: "This cannot be considered as a sale; the defendants are not linendrapers; they had no warehouses; they do not even appear in the matter. It is a scheme to save themselves and to cheat innocent persons; a fraudulent design." In the case before us, the plaintiff claiming to have bought all the stock in trade of an absconding debtor, the night before he absconded, was no merchant, but a lawyer, who came to this country merely to make this arrangement, and came from the country to which the debtor the next day fled. He had no warehouse, nor, as appears, any establishment or place of business in the province. It bears strong marks of a fraudulent design to injure innocent persons, without even the motive of saving himself, so far as Grant was concerned, for he does not seem to have been a creditor or to have had that excuse.—*I Bl. Rep.* 362. In the same case, Aston, J., says, "The property was not changed by such a sale; it was a scheme, concocted on the eve of a bankruptcy, to defraud innocent persons, in order to secure particular creditors. It is such a fraud as shall render the sale void." And what he says of that case, I should be much disposed to say of this. "The jury could not have found otherwise than they have done, unless they were out of their senses."

Let us suppose, in this case, that a debt to Bradbury had been proved, and no difficulty on that point, and that the jury, on the merits of the case, had affirmed this transaction as a *bona fide* sale of all Lowry's goods to Grant, could we have hesitated to grant a new trial? I think certainly not. To allow so apparent a fraud to be successful would be a reproach on the administration of the law, and deprive the honest creditor of all chance of protection. The jury, how-

ever, did not regard the sale as *bona fide*, and then it only remains to be considered—1st. Whether they were warranted in saying it was made to defeat creditors, i. e. any creditors. And 2ndly. If so, whether the defendant in this action can defend his act in seizing, against Grant, claiming under the fraudulent and colourable sale, without proving that the debt for which Bradbury sued out his attachment is really due.

As to the 1st. point. A jury, sworn to give a true verdict, are not to shut their eyes against what is plain to all the world besides. They are not, as Mr. Justice Aston says, to take leave of their senses. When they saw a barrister or attorney come over from a foreign country to take an assignment, on Saturday night, of the whole effects of a merchant who absconded next day, and when they found a variety of such suspicious circumstances accompanying and following the transaction, as convinced them it was not fair and real, could they be at any loss in inferring the motive? No looker on, who heard the trial, would have a doubt on that point. Whether the design was to defeat persons who were their creditors, or persons just about to become so, the legal effect would be the same ; and that there were creditors of one description or the other, whose vigilance it was intended to elude, was proved, I think, to any reasonable satisfaction. No other motive was shewn or suggested than such as always leads to these shifts and contrivances of absconding traders, nor did Grant offer any evidence to shew how he became concerned in a transaction so strange as to him, and so suspicious, that various persons in Prescott refused to have any hand in assisting him in it. The witness says he feared Bradbury would seize them under an attachment ; that shews a consciousness that a claim was intended to be urged, and might be urged ; and soon after an attachment came.

But then it was said we may grant that this sale was fraudulent, being made to defeat creditors ; and still the sheriff could not treat it as such, unless he can prove a debt due to Bradbury. If that were so, in most cases, if not in all, such frauds would be successful. When once it is estab-

blished that the sale is fraudulent, as being by covin, that is, a feigned and pretended sale, it is not correct, in my opinion, to say that Bradbury has no right to question it, and must be treated as a trespasser if he attaches these goods, unless he shews that he is clearly a creditor. In my opinion, his right goes farther. The 13th Eliz. and our Absconding Debtor's Act give him a right to say that his action, *brought for determining* whether he is a creditor or not, shall not be disturbed or hindered by a pretended sale, which is fraudulent and void. It is a maxim of law, that fraud in an indifferent matter shall not be supposed or conjectured on mere surmise. It is against principle to entertain the suspicion, without any kind of proof that Bradbury is knowingly urging a false demand; our duty is to suppose rather that he is advancing what he thinks to be a legal claim. If his suit were allowed to proceed unobstructed, he might be adjudged by this court to have no legal claim, when he sincerely imagined that he had: and afterwards, a tribunal superior to this (if the value of the case admitted of an appeal) might determine that our judgment was erroneous, and that he really was a creditor. Now, in my opinion, he has a right to his attachment, in the mean time, to place the goods of Lowry in the custody of the law, that he may securely proceed in this action; and that right is not to be met by a void colourable bill of sale, growing out of a conspiracy to defraud him or any body else. I think the common law would have afforded this measure of protection, if the 13 Eliz. had not been passed.—Cowp. 433. I think parliament, when they framed that statute, may be most reasonably supposed to have designed the same protection to just and honest dealing, and the due course and execution of the law, to the same extent; and I think they have done so by the plain and express language of that statute. By the preamble and the first clause of this act, it is declared that feigned or covinous alienations of goods, made to defeat or delay creditors, shall be utterly void, frustrate, and of none effect. If there were no qualification whatever in that clause, then it might be contended that no person whatever, for any purpose, or

under any circumstances, could advance a title under a sale thus made by statute utterly *void* and of no *effect*, and that consequently the vendor might, as against the vendee, allege his own fraud and set aside his own act. Such a consequence (and, in my opinion, such a consequence only) the legislature meant to preclude; because that would have militated against sound and general principles, and would have had an immoral tendency. It would be allowing a man to take advantage of one act of fraud, committed by himself, in order to make it the means and instrument of another fraud; and would have led to proceedings disreputable to courts of justice. Therefore these words are inserted in parenthesis ("only as against that person or persons, &c., his or their heirs, &c., whose action, suit, debt, &c., by such covinous or fraudulent practice as is aforesaid, shall or might be in any wise disturbed, hindered, delayed or defrauded"). "That person whose," &c., refers to nothing that went before, by any rule of grammatical construction. When we ask, "what person?" we must look to what follows, not to what goes before, for ascertaining it; and it is "that person whose *action* might be *delayed, disturbed, &c.*, by such fraudulent device." Now if the sheriff here, with all the evidence of fraud before him, had allowed these goods to have gone beyond his reach, intimated by the bill of sale advanced, Bradbury would have been a person "whose action was disturbed by a fraudulent alienation, made to defeat creditors" (no matter what creditors, or how many, or when they became creditors). If parliament had meant otherwise, they need but have said that the sale should be taken to be fraudulent "*only as against any creditor or creditors,*" and saved themselves all the trouble of speaking of suits, actions, &c., being delayed, hindered, &c. And in other statutes, where that only is meant, the language is such. The case of *Tuberville v. Tepper*, 2 Rol. R. 492, is in point, I think, to prove this construction the right one; for there it was the first point raised, that the statute 13 Eliz. made collusive alienations void only as against creditors; and that the sheriff not being a creditor, he could not object that the sale was fraudulent;

but the court ruled otherwise, adding that the word *only*, in the 13 Eliz. (used in the parenthesis only as against that person, &c.) was put into that statute solely "*pur exempter le grant*," or, as I render that, solely to exempt the effect of the bargain as between the parties. And I take the court to mean that no other person shall be injured or impeded by it. I consider the 3rd clause 13 Eliz. ch. 5, to be so expressed as to evince clearly that the meaning was that which I ascribe to the preceding clauses; for it declares that when a sale, &c., has been fraudulently made to defeat creditors (as undoubtedly this pretended sale would be, if it had been proved to have been made to defeat *any* creditor whatever, as well as Bradbury in particular), then the putting it in use, avowing, maintaining, justifying, or defending it as true, simple, and made *bona fide* and upon good consideration, shall subject the party to a penalty. Now, surely claiming under it against the sheriff is putting it in use, whether Bradbury was suing upon a legal cause of action or not; and I do not apprehend that a participant in a fraud can appear as plaintiff, and recover damages as the vendee, in a collusive sale which a statute has prohibited and rendered it penal in him to *avow*.

Besides, upon the facts of this case, there is that which goes far, I think, to distinguish it from most if not all of those cases upon the authority of which it is urged that the sheriff must give proof of a debt to support the process. The goods were in reality not taken in the possession of Grant, the present plaintiff, but were seized at Kingston, packed up in boxes marked with the name or trading mark of Lowry, the defendant in the attachment, and in the charge of a third person, who swears indeed that he was employed by Lowry, and not by Grant, but whose agent in effect he was and for whose benefit he was acting, was fit matter for the jury to consider, because on that it depended whether the goods were to be regarded as seized in the possession of Grant, or not. And I must say that I should not be disposed to find fault with the judgment of any person who, on the evidence given, should find the goods to have been held in charge for Lowry, however Grant may

have intervened as an intermediate agent, and employed the third party to answer the purpose of Lowery, or rather to carry into effect the covinous contrivance in which they both were actors. What in the evidence given at the trial is called a bill of sale, is in fact nothing in the shape of a bill of sale. It is a mere inventory of every article (apparently) in the shop, even to the yard stick, scales, weights, &c., all the ordinary trifling articles of household furniture, such as chairs ; the whole, at the valuation given them, amounting to 450*l.*; and at the foot is Lowry's receipt in full, stating that Grant had paid him that sum. For these goods, so far as credit may be given to Lowry's evidence, Grant paid him in cash \$70, and gave up a note of Lowry's of \$1000, which he (as attorney, I suppose) was employed to collect for some other person, and gave him his own note for \$700, payable at 90 days. The interrogations proposed to Lowry are not well calculated to settle the case. Instead of asking him whether, when he gave that bill of sale, on Saturday night, he was indebted to Bradbury, or to any other person, that is assumed, and he is asked whether he did not know when he made the transfer of the goods that Bradbury, to whom he was indebted, was taking out an attachment through Mr. Malloch, and that Bradbury's agent was at that moment in town for that purpose. He says *he did not know that* ; not denying that he owed Bradbury, or saying anything about it, nor giving any account in what manner or for what reason he made this singular transfer of his property to Grant the night before he absconded.

My conclusion upon the law and the facts of the case is this : That the goods were once Lowry's is indisputable ; and the sheriff was authorized by the writ of this court to attach Lowry's goods. Acting upon this writ, he attached the goods in question, and was of course justified in doing so, unless Lowry had divested himself of the property that he once had in them. The plaintiff, Grant, asserts that he had sold them to him, and he treats the sheriff as a trespasser in seizing them as the goods of Lowry. If, in truth, Grant did buy them, he has a right to this action, and the sheriff is a trespasser. But if the jury were satisfied, from

the facts, that, instead of Grant having bought them, he has for any covinous purpose, no matter what, entered into a contrivance with Lowry, that, instead of buying them, he should merely be prepared to hold out to the world the appearance of having bought them, while in truth they should be kept or disposed of for the benefit of Lowry, either by Grant, or by any third person instructed by him ; in such a case, whatever validity the feigned transaction may acquire as between themselves, by the disability they are both under of setting up their own fraud, either as a ground of action or as a defence, still, as regards the right, interest, or remedy of third parties, truth and fiction are not to be confounded ; and if the sheriff says at the time, and has at the trial satisfied the jury that the appearances were deceitful, and intended to be so, that the sale was pretended not real, and that by the understanding between the parties Grant had not acquired nor Lowry parted with the beneficial interest in these goods ; then, in my opinion, the sheriff did right in not giving to fiction the force of truth, in considering the property in these goods unchanged, and holding them still liable to the remedy of suitors, as the goods of Lowry. We may admit the right of Lowry to make an alienation of those goods, and that such an alienation would at common law at least have placed them out of the reach of this attachment ; and still the question remains, *did he in truth make such an alienation ? or did he only falsely pretend that he had done so ?* If, acting upon this view of the case, the jury, upon the question being submitted to them, had found that these goods, when they were seized at Kingston, packed up as they were in cases marked with Lowry's name, had never been actually sold by Lowry, but were at that time in the agent's possession for his use and benefit, and had not become the property of Grant by a bona fide sale, I should not have felt inclined to have disturbed their verdict. But the matter was not so put to them, and I would, therefore, not rest the case upon the bare ground that the sale was a fiction and not real, for that has not been found by the jury. But I turn to the other, and perhaps more satisfactory view of it. The jury have found

that the goods were fraudulently transferred, to delay and defeat creditors, that is, creditors generally. I think the facts proved warranted that conclusion, if, indeed, a transfer was intended at all, which I do not believe. The bill of sale executed at 10 o'clock at night; the absconding of the trader Lowry on the next day; the admission of the witness, of the means he used after the transfer to keep clear of the attachment, or claims of Lowry's creditors; the questions and answers upon the examination of Lowry; and the whole complexion of the case, shew to my mind plainly, that if a transfer of the goods was made to Grant, it was made for the purpose of defeating, delaying, or hindering creditors or others, in the words of the statute. I think, therefore, that the jury were justified in their verdict, and that, as a necessary consequence, such a transfer is, by the express words of the statute 13 Eliz. c. 5, made utterly void, frustrate and of none effect; not as between the parties to the covinous alienation, but only as against that party, or, in other words, any party, (for so I understand the statute) whose suit, action, &c., is or might be by such fraudulent alienation, defeated or hindered. I think, consequently, that neither Bradley's nor any other person's suit, action, &c. is to be hindered, defeated or delayed by Grant setting up this fraudulent and pretended alienation, made to defeat creditors, and that Grant cannot under it claim a right to damages against the sheriff for treating it as void and frustrate, as the statute declares it to be, and for not suffering it to impede the due course of law and justice. If Bradbury shall ultimately obtain judgment, these goods will remain to answer the debt proved and the defendant proceeded against as an absconding debtor, or his vendee, fraudulently combining with him, ought not, in my opinion, to be suffered to evade the remedy of any person asserting a claim, by setting up a collusive colourable sale. I think the 13 Eliz. was intended to prevent this, and does prevent it, and that the sheriff may safely disregard such a transfer without being prepared to shew that any such debt as that claimed by Bradbury in his attachment, is in fact due. I have expressed these opinions, because the case is

one of interest and importance; such transactions as seem to have been attempted in this case are not unfrequent, and their legal effect should, as soon as possible, be settled and known. My brothers think a new trial should be granted, differing from me principally on the construction and effect of the statute of Eliz. I concur with them in granting a new trial, because I should like the jury to have been charged more particularly to express their opinion upon the real character of the transaction, and I have only felt it necessary to explain the different view which I take at present of the law, because these principles may in the future stages of this case, or in some other case, come into discussion; and I wish my opinion upon them not to be misapprehended.

SHERWOOD, J.—It appears to me the first inquiry to be made in this case is, whether George Lowry, for a valuable consideration, sold and delivered the goods in question to the plaintiff. If he did so, and if the plaintiff received them with the intent of becoming the owner, I think the sale binding between the parties themselves. Lowry could never impeach it, for a vendor is not permitted even collaterally to defeat his own sale, on the ground of fraud in which he is a party. *Melior est conditio possidentis*—the vendee being in possession, his title is preferred, and the sale is valid notwithstanding the fraud of the parties—*Cro. Jac. 270*; *1 Stark, 60*; *2 B. & A. 134*. By the common law, a creditor or any person claiming title to the goods, whose debt or title accrued before the sale, might avoid any fraudulent sale which had been made before to deprive him of his debt or right, as if a man had a title to goods in another man's possession, who should fraudulently sell them to a third, cognizant of the title; the conveyance would be invalid if it were even made in market overt; but if the debt or title accrued after the sale, it would have had no effect upon it—*2 Inst. 713, 360, 83*; *Yelv. 196*.

The statute 13 Eliz. c. 5, extends the principle much further, and has been construed to avoid sales which are made before any debt is contracted, where a fraudulent intention is clearly established, and the transaction appears

to have originated in a design of defeating future creditors of their just and lawful claims.

The defendant in this case is sheriff of the Midland District, and seized the goods in question, on a warrant of attachment issued on the application of an alleged creditor of Lowry, eight or ten days after the sale to the plaintiff. By virtue of that writ the sheriff had an undoubted right to take all goods belonging to Lowry, whether he found them in the possession of Lowry or in the possession of a third person. Under the general issue, the sheriff might shew that the whole transaction was a mere collusion and trick, and that the plaintiff and Lowry never contemplated a sale of any part of the goods, and, consequently, that they still remained the property of Lowry, because a merely colourable and unreal conveyance would be of no consequence in law as respects the parties themselves ; and *a portion* could not be a sale as regards the sheriff, whose duty it was to seize the property of Lowry. If the transaction amounted to a sale between the parties themselves, and Lowry by his own act was estopped from disputing its validity, then I think the sheriff could not impeach it, unless upon the ground of fraud against creditors or others having a just right of action against Lowry. If the sheriff seeks to avoid the sale, as being fraudulent against creditors, when he seizes the goods under a writ of *fi. fa.* in the hands of a third person claiming title to them by purchase from the defendant in the suit, he must prove the judgment, or, in other words, he must prove there was a creditor ; and I perceive no difference between the sheriff acting under a *fi. fa.* or a warrant of attachment, as regards the possession and title of a purchaser of the goods—*1 Ld. Ray. 733.* These are the principles established in the case of *Lake v. Billers*, *2 Bl. Rep. 701*, and *Martin v. Podger*, *5 Burr. 2631*, and, in my opinion, are consonant to the common and statute law, and conformable to reason and justice. It would be altogether inconsistent with the established law of sales and rights of vendees, to allow the sheriff, except in favour of creditors and others having just claims, to nullify the title of the purchaser on the ground of fraud, which the policy of

the law forbids the vendee himself to urge for the same purpose. In the present case, a verdict was given for the defendant, on the ground that the sale from Lowry was fraudulent against the creditor who sued out the warrant of attachment under which the defendant seized the goods; but no debt was proved, for which reason the defendant seeks to set aside the verdict, and in my opinion, he should succeed. According to the evidence given at the trial, I think Lowry intended to sell the goods to the plaintiff, and that the sale is valid, as regards the parties themselves who made it, as well as the sheriff who had the warrant of attachment, unless he proves the debt upon which it issued, and the plaintiff's knowledge of its existence.

MACAULAY, J. (after stating the case.) In disposing of cases in which fraudulent or void alienations are alleged, it should be considered, in the first place, whether the person impeaching the transaction is seeking relief as a plaintiff, or resisting an action of the supposed fraudulent vendee as a defendant; and in the latter case, whether such defendant is the party actually interested in the subject matter, or merely as officer of the court, implicated by reason of his having acted at the instance of a suitor, the party interested. Transactions like the one in question are susceptible also of being regarded under separate aspects. 1st. As liable to be avoided at common law. 2ndly. As subject only to be questioned in favor of creditors, and under 13 Eliz. ch. 5. The defendant in this case being a public officer, acting under judicial process, and not a party beneficially interested, I shall in the first place notice what I consider the rule of evidence, applied respectively to the party and the officer. When the action is brought by the defendant in the process, the sheriff must plead specially, and can justify the caption of the debtor's goods under the writ alone; but if the action be brought against the plaintiff in the writ, he must (in final process) plead the judgment, and in mesne process it is probable he must shew his right to issue it, as by the affidavit of debt. The same rule applies when the action is brought by a stranger out of possession, and the defence is that the goods belong to the debtor, except that

such defence may be made under the general issue. In that event, neither the sheriff nor the party can be implicated as *prima facie* trespassers, owing to the want of possession in the plaintiff in trespass, who being obliged to prove title and right of possession, it would be open to the sheriff, or the creditor under the general issue, to prove that the goods belonged to the debtor, which would destroy all right of action in the stranger, even were no writ at all produced, but undoubtedly nothing beyond the writ could be exacted.

When the goods are taken from the possession of the stranger, the sheriff may still justify under the general issue, upon producing the writ, because it authorizes him sufficiently to seize the debtor's goods ; and if it can be shewn that those were his, though in the hands of a stranger, the officer would stand justified : the sheriff would not be a mere wrong doer ; and proof of absolute title in the debt, would rebut the presumptive right of property or possession in the stranger, in whose hands they were found. Where the original plaintiff is sued in trespass by a stranger, under the last mentioned circumstances, it may be necessary for him to prove as much under the general issue as would be required of him under a special plea at the suit of the original defendant, in order to remove the appearance of his being a mere wrong doer, and to establish the right to take the property of the debtor, whose goods he intends to shew those in dispute actually were. But when the goods, being taken in the possession of a stranger, his right is sought to be impugned on the ground of fraud, either at common law or under the statute 13 Eliz. chap. 5, I do not perceive that in the matter of proof the sheriff stands upon any more favourable ground than the creditor or original plaintiff, though the defence as disputing the stranger's right of property may be made under the general issue.

The sheriff is bound to take notice at his peril of the property in the goods. If, apart from fraud, he can shew them to belong to the debtor, the writ will sufficiently protect him; but if he seeks to urge any alleged fraud, as against creditors or other strangers, in order to divest the plaintiff in trespass of his *prima facie* right, he is in no more favor-

able circumstances, in point of proof, than the creditor or original plaintiff. Neither a writ of *fi. fa.* nor of attachment have any relation back ; they impart to the sheriff a bare authority unconnected with any interest, and merely authorise the levy of the goods belonging to the defendant therein at the time of their receipt. He might equally attach them, whether in the hands of the debtor or of the stranger, and if sued in trespass by such stranger, he could, under the general issue, prove that the property belonged to the debtor, whose goods he had a right to seize, as evinced by the production of the writ. The writ would shew his right as against the debtor, and the facts would prove his ownership of the effects. Still, when the goods are found in the possession of a stranger *claiming property*, and the sheriff seeks to justify the levy under the writ, he must shew that the *right of property* and *possession* subsisted in the defendant at the time of the receipt of the writ, although in the visible possession of a third person, whose possession would be only that of a bailee. The right of property is to be determined as a result of law, from the facts of the case and the intentions of the parties as between themselves, exclusive of all imputation of fraudulent motives towards others. If the facts, when developed, be such that the assignor, however innocent, is estopped by his deed or otherwise, from controverting the right of his assignee, all the world (including fraud) are equally bound. But if they be such that the assignor, being innocent, is not estopped from asserting and proving his paramount right, neither shall the sheriff or others be estopped from shewing that right of the debtor ; and further, though the features of the case be such that the assignor, by reason of a fraudulent design superadded, is on *that account only* precluded from shewing the truth—which truth, if shewn, would establish property in him—then the sheriff or any other stranger entitled to levy upon the goods, shall not be estopped by *that fraud*, in which they are not participants, from shewing the truth. It may be said, therefore, that fraud shall not estop the sheriff, however it may conclude the debtor ; but in such cases the *fraud* is not offered by

the officer to *defeat* the transfer, it is merely *not allowed to* be urged by the assignee to estop him from proving the right in the debtor, as it might have been urged as against the debtor himself. The assignor is not permitted to avail himself of it to sustain his possession or claim, nor is the covin (which term I use as synonymus with fraud) elicited by the sheriff, in support of his right to levy. The right of property *inter partes* when there is no estoppel, depends upon the facts and intentions when separated from collateral motives of fraud. When fraud is relied upon to defeat the action of the assignee, it is obvious his right in its absence must be conceded. The goods must be allowed to belong to him in the absence of fraud, and only liable to be divested upon proof of its presence—the reason can be suggested. Fraud in the sale or gift of chattels must partake of one of two characters ; either one person may deceive or impose upon another in a transfer, which would be fraud as between themselves, and not be subject to be inquired into or excepted against by any stranger ; or two persons may conspire in a transfer, or one may assign to another ignorant of the act, in order to defeat or injure strangers ; against the latter such strangers could complain.—9 Co. 115. But to constitute fraud in law, there must be a covinous motive, design or intent to deceive or prejudice one or other of the parties, or one or more strangers—a fraudulent object must actuate the parties continuing or conspiring to accomplish an illegal purpose. And I do not see upon what principle there can be fraud in the interchange of goods that a stranger can except to, unless such stranger were directly sought to be injured, or be collaterally prejudiced in his interest. If, apart from fraud, the property has been transferred, then no one but those especially affected by the fraud can for that reason avoid the transaction. It is only corrupt to the extent of their pretensions, and it ceases to be fraudulent against all others ; and consequently a sheriff, having no interest, and but an authority not relating back, he cannot, under a writ only, unravel any antecedent alienation or gift on the score of fraud, if *inter partes* the property was changed by the nature of the ar-

transaction divested of the fraud. In other words, the writ of itself will not enable him to shew a transfer fraudulent and void *quoad* creditors. He shall not be estopped, by reason of any fraud, from shewing the truth, so far as the assignor might have shewn it if he had been innocent ; but the matter of fraud being suppressed or separated from the transaction, the officer must rely exclusively upon the right and title of the debtor *aliunde*. When he goes a step beyond that, and does not seek to overlook the fraud as an estoppel but to turn it against the assignee in favor of the alleged right of the assignor, he then would assert more than the assignor himself could advance, if innocent ; he would claim a privilege, he would cease to be neutral *quod* the fraud, he would advance it in his favour, he would identify himself with those entitled to dispute the agreement because tainted with fraud. It will be seen, that under such circumstances the sheriff, under final process, must support the proceeding by proving the judgment as well as a writ ; and the same rule, I think, extends to attachments or other mesne process authorizing a seizure of the debtor's effects.

It has been said that the principles and rules of the common law, as now understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statute 13 Eliz. ch. 5 ; and that Lord Coke has, in three different places, remarked upon the force of the word "*declare*," with which the enacting part of the statute is introduced.—Cowp. 434 ; 3 Rep. 826 ; Co. Lit. 76 a. 290 b. ; 3 T. R. 546. But however the principles of the common law might well have extended to reach all cases within the *original intent* of the covinous party, even subsequent creditors if contemplated, it seems to have been generally understood that only those whose rights subsisted at the time, and whom it was designed to defraud, could at common law overthrow fraudulent gifts or assignments ; and that fraud with a view to particular objects only would not enable another, consequently damaged, to defeat the transaction, not being a person intended to be embraced.—Bac. Abr. Fraud ; Roberts, 46-7, 452-3-5 ; 1 Rep. 93 ; Dyer, 1926, 1977 ; 10 Rep. 56 ; Lane 47.

It would seem also that at common law, if possession did not accompany and follow the deed, but continued with the assignor, contrary to the purport and terms of the transfer, it might be left to a jury as evidence that no sale or change of property had taken place.—5 Burr. 2631; 2 W. Bl. R. 701; Cro. El. 810.

The principle here suggested does not rest upon a ground perfectly satisfactory to my mind, unless urged by a creditor having proved his debt. It is apparently considered that in some feigned gifts or sales, fraudulent and merely colorable, not real fair transactions, if the possession has not been changed, the property, *quoad* all strangers entitled to attach the goods of the assignor, remains in the latter; so that in an action by the assignee (out of possession and therefore necessarily resting upon the instrument of assignment, as giving the right of property and drawing to it the possession in law), the defendant may effectually resist it by contesting the right and title, and shewing that, notwithstanding the sale the property was not changed, but remained in the party in whose hands it was seized. But I find no case in which such a course is sanctioned when the possession has been changed, without proof of a debt or other interest subject to prejudice. The statute 13 Eliz. ch. 5, comprehends all alienations, feigned and real, by gift or sale, and all rights antecedent and subsequent; but it extends only to those whose debts, suits, &c., are liable to be defeated or delayed, and who must, to avail themselves of its provisions, establish that character. It is in the first place to be determined, whether the present case falls within the common law principle suggested in Martin v. Podger—that is, whether, under the evidence, it should have been left to the jury to say whether the goods did not belong to Lowry at the time of the seizure, notwithstanding any collusive feigned sale to the plaintiff; in which event the writ alone, as justifying the seizure of Lowry's effects, in whosever hands found, would amply protect the sheriff and sustain the defence. It appears to me, it could only be submitted to the jury in that light upon the ground that, notwithstanding appearances, no change of property had

taken place ; but that if the property could be regarded as changed, the case could no longer be so treated, especially when the possession followed the right. Possession, when inconsistent with an alleged transfer, has been held conclusive evidence of fraud as against creditors : and it seems to me that in *Martin v. Podger* the possession in the vendor was relied upon as the main ingredient, the principal evidence from which, it is said, the jury might have inferred that no such sale as that set up had ever actually been made. Lord Mansfield said it was a colorable sale, not a real fair transaction, but leaving the possession in the son, and fraudulent even at common law, independent of the statute, and we have seen who at common law could urge the fraud. Again, he said it might have been left to the jury to say whether the plaintiff, the father, was in possession of the goods or not. Again, that the defendants were merely nominal ; that the original plaintiff was to be considered as the creditor of the original defendant, why not being explained. But he adds, that the judgment ought to have been produced ; that the verdict arose from a slip, &c., and was against law and justice (assuming the original plaintiff to be a creditor), that the son remained in possession, &c. The verdict was not set aside for misdirection, but upon the general merits and payment of costs ; and it is by no means declared that at the subsequent trial the judgment could be dispensed with : indeed, the contrary is to be inferred. At all events, it is not implied that, had the vendor been clearly and fully in possession under his fraudulent bill of sale, the case could have been treated otherwise than under the statute 13 Eliz. Possession is *prima facie* fair proof of title, and sufficient to maintain trespass against any mere wrong-doer. When, therefore, a vendor is in possession, he can establish his right of action in trespass *prima facie* by proof of such possession alone, casting it upon the defendant (a *prima facie* wrong doer) to investigate his title and impugn it on the ground of fraud ; to do which he must shew a debt or other cause of action hindered or delayed, &c. But when the vendor continues in possession, the property is *prima*

facie his, and a seizure justifiable under process against his goods ; and as the vendee has no apparent right, he must, to sustain trespass, shew his title ; he is himself obliged to bring his right into discussion in order to rebut the ostensible ownership of the vendor, as evinced by his actual possession ; and it is in the latter event that it has been deemed open to a jury to say, whether there was proved any interest sufficient to sustain trespass subsisting at the period of the levy. It could, under those circumstances, be urged, that the bill of sale might have been clandestinely executed or delivered after the seizure, or the transfer have been inchoate awaiting the delivery of the deed or of the goods to consummate it, or that the vendor might have resold or given back the goods (for the parties have relinquished or abandoned an intended transfer), or the vendor have been the general bailee of the vendee, with power of disposal at his discretion. Many constructions might be placed upon equivocal conduct ; some pressing against any change of property, others adopting it, though accompanied with secret trusts ; such transaction being *equally fraudulent in either point of view*, that is, towards creditors and others within the statute. I do not perceive any sound principle upon which a seizure can be justified as being the property of the assignor, unless the right and ownership continue in him. If, as between themselves, the right of property be transferred to the assignee, and possession be delivered, every such presumption would be excluded. What effectuates a change of property between a fraudulent vendor and vendee ? Ordinarily a bill of sale or other assignment delivered has that effect when the goods are ready for delivery, however attempted to be clogged by verbal conditions. Even in the absence of fraud, a deed delivered as an escrow to the party himself becomes absolute immediately ; the maker is estopped by his deed delivered ; and it is well known that verbal conditions, superadded to or accompanying written agreements, are to be rejected ; all the terms should be incorporated in the instrument, and the omission of any excludes their proof. In cases of sales so circumstanced, inconsistent conditions (such as parol trusts, &c.) could not be set up in a

court of law by an innocent vendor, and the vendee would acquire absolute right. So if the transaction be tainted with fraud, the assignor is estopped by reason of the covin (if upon no other principle or rule of law), from shewing the truth when at variance with his conveyance.—2 Roll. 173; Cro. Jac. 270; Yel. 186; Hob. 166; 2 A. & B. 365. If for covinous purposes chattels are given or sold and delivered under a feigned gift or sale, not meant, *inter se*, to be operative, but designed merely to cloak the goods without causing a change of property, then, whatever the secret views, understandings or expectations of the colluding parties may have been, the assignee is precluded, owing to his fraud, from evading the transfer; and the consequences are, that the vendee gains a title by fraud conclusive upon the vendor. Upon such title, attended with possession, the vendee could maintain trespass or trover against the vendor, or resist an action at his suit or that of his representatives. He could sell or bequeath the effects, or his representatives might treat them as assets of his estate. The possession and right of property being combined and accompanied with the right of disposal *ad libitum*, it would seem to follow, that the absolute right of property would pass from the vendor to the vendee, as between themselves, and consequently he would become sole owner as against all the world *prima facie*, and until a creditor or some one entitled to question his title should appear. If, in the absence of fraud, the assignor could shew his right, then no stranger shall by reason of such fraud be estopped from proving the truth, and herein lies the difference between the two. But be it again observed, that the stranger seeks no aid from the fraud as against the assignee. If, independent of fraud, the goods had as *inter partes* ceased to belong to the vendor and had become the property of the vendee, they could not be attached under a subsequent authority extending only to the goods of the former at the time of its receipt. To enable the sheriff to go back and explain the previous transaction, he would be obliged to shew that *quoad* creditors, &c. the assignment was void, and that he was acting on behalf of a party interested in that capacity. When the vendor is

found in possession, the writ alone, it is said, would justify the levy, if it could be shewn that the transfer set up was colourable, fraudulent and pretended ; but when the possession is changed, and has passed from the vendor to the vendee, I apprehend the sheriff must prove the debt as well as the writ, because, being conclusive *inter partes*, it is equally conclusive upon all mankind until some one appears who, in his peculiar instance, has a right to disturb the arrangement. It is no sufficient argument that the sheriff may be embarrassed, that he must often act promptly, that delays would frequently be dangerous—sometimes ruinous ; for it is well settled that he is bound to take notice at his peril of the property in the goods. It has been held, that in seizing under a *fi. fa.*, when the case falls clearly within the statute, he must shew the judgment ; and many hardships that might occur under writs of attachment might be equally incidental to final process. In the sense before us, however fraudulent or feigned in point of fact, a sale was made in form, and possession was delivered to the plaintiff, sufficient to clothe him with the right of property as well as the possession ; and in my opinion, under the evidence, the right of property must be taken to have been changed *inter partes* by operation of law. The plaintiff asserts it ; and the debtor not only admits it, but is estopped from denying it. I thence infer, that the plaintiff, being in possession under a colourable sale, is entitled to maintain trespass against the vendor, and all others forcibly dispossessing him of the goods, unless it be shewn to have been done legally by or in behalf of some one whose rights are infringed, and who is therefore enabled to impeach the title, so far as his rights are concerned. I assumed and still think the case falls properly within the statute, the provisions of which are now to be adverted to. At Nisi Prius, this cause was assumed to be and was left to the jury under the statute.

The statute 13 Eliz. ch. 5, comprehends all cases relivable at common law, and protects also *subsequent* creditors and others, whose just and lawful actions, suits, &c., may be hindered or delayed by reason of the fraudulent disposal

of the effects, although the primary and only object may have been to disappoint other parties.—2 Atk. 600. Being based in fraud to a particular intent, the statute declares it null to all intents, in favor of all creditors and others thereby prejudiced, directly or consequentially. The statute includes all creditors, antecedent or subsequent, and others, whose just and lawful suits, actions, &c., may be hindered and delayed, and annuls the collusive assignment only, as against that person or persons so prejudiced ; which person or persons, in the parenthetic clause, means, in my opinion, creditors and others (previously mentioned) whose just and lawful suits, &c., should be delayed, &c., and no others.—Roberts, 49, 51, 53, 58, 92 ; Cro. Eliz. 233 ; Holt, 327. When the statute is relied upon, either necessarily or in preference to the common law, any party (creditor or officer) seeking to impugn a fraudulent alienation, must prove the party aggrieved to be within its protection, because it is only as against such person that the same is subject to avoidance. It would seem that the statute *must* necessarily be resorted to when the property has been changed, when there has been a gift or sale in effect, though fraudulent in design, and the complainant is a *subsequent* creditor ; and that it may be resorted to or not, at election, in other instances already mentioned. But in no case, whether the assignment be feigned or real, or whether the debt accrued before or after its execution, and whatever may be the state of the possession, can any one claim refuge *under the statute*, without proving that he was or acted lawfully on the behalf of a creditor or another, whose just and lawful suit, &c., was hindered or delayed by the covinous transaction. It is only in favour of such the statute operates.—2 Lord Ray. 733 ; 5 Burr. 2631 ; W. Bl. 701 ; Bac. Ab. Fraud D. ; Bull, N. P. 234; Prec. Cha. 223 ; Doug. 41-2 ; 6 M. & S. 100; 1 Bing. 100 ; 8 Moore, 46.

I am fully satisfied that, treating a case as within the statute, a sheriff as well as a creditor must prove the debt, as well as the writ, upon mesne or final process, unless admitted by the nature of the pleadings and the issue.—Latch, 222 ; 2 Roll. 493 ; 3 Lev. 47 ; 2 Lev. 8 ; 2 Mod, 195;

Com. 18; 4 Ea. 1; 2 Lev. 85; 4 T. R. 611; 2 Saund. 150 a. (n. 1); 2 Esp. N. P. C. 477 n.; 10 B. & C. 202. Nothing less vindicates the caption of the goods; and by acting, the officer assumes the onus of shewing a judgment to support final process, or a debt or other just and lawful cause of action, to warrant and sanction the execution of incipient process.

The act declares all alienations void, if made for the purpose of delaying *creditors* and *others* of their just and *lawful* actions, suits, *debts*, &c. It may be presumed that, under the word "*others*" was meant to be included not *creditors*, but *others* than creditors, whose suits, &c., by such fraudulent devices might be delayed. It has been said to extend to those who became creditors *after* the transfer; but it seems to me the term *creditors* might of itself be reasonably extended to them. There are many persons not properly called *creditors*, whose suits, actions, &c., might be hindered or delayed, such as plaintiffs in real actions, those suing for heriots, reliefs, mortuaries, &c., in which process against the goods may be necessary to compel appearance, or to enable the suit to proceed. It is obvious that in such cases they might be delayed in their actions or suits, though not in their *debts*, the subject matter of the suit not strictly partaking of that character. A creditor may be delayed or hindered in his debt, and also in his suit or action. Others may be delayed in the latter, though not in the former. The usual mode of executing an attachment against a defendant in real actions, suits in inferior courts, or other proceedings in which an attachment after summons and default constitutes the proper process (though nominally against the person), is by attaching his goods. In all such cases as these, the parties are comprehended under the term *others*, and not *creditors*.—2 Atk. 600. The question then presents itself, whether any person, upon shewing a fraudulent assignment to delay and hinder creditors, can, whatever be the merits of his demand and without shewing them, impeach such transfer under the parenthetic clause (only as against such person or persons whose action or suit could or might be delayed), or whether the person

seeking to disturb the assignment should not (when only entitled to do so by aid of the statute), bring *himself* within it, by shewing that he is a creditor or another, whose just and lawful suit was liable to be hindered or delayed ; in other words, by proving a debt or other *meritorious* cause of action in himself, entitling him to seize the property, notwithstanding the alienation, as goods of the fraudulent vendor. My opinion is, "that person or persons" in the parenthesis means a "creditor or others" previously mentioned, and that such *only* can avail themselves of the provisions of the act when it is necessarily resorted to.

The act declares that all and every gift, grant, alienation and conveyance of lands or goods, made, devised or contrived of mature fraud, covin, collusion or guile, to the end, purpose or intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damage, penalties, forfeitures, heriots, mortuaries and reliefs, shall be deemed and taken to be clearly and utterly void, &c., only as against that person or persons (his or their heirs, successors, executors, administrators and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous and fraudulent devices, &c., are, shall or might be in anywise disturbed, hindered, delayed and defrauded. If upon proof of a fraud under the statute, meditated against one who does not come to complain, any person consequentially affected could, without proving himself to possess any right, or to be injured in respect of any right expressly guarded by the statute, apply the fraudulent intent and act in his favour, those portions of the statute which speak of other than creditors whose just and lawful actions, suits, &c., might be delayed, hindered, or defeated, would seem words of sepererogation in many points of view in which they have been deemed material. For example, if the intent and object were to defeat or prevent creditors not complaining, and a subsequent creditor or suitor, or one who pretended to be such, could shew it in order to avoid the alienation ; and he could claim the benefit of the statute in his behalf under the parenthetic clause

without regard to or requiring the aid of that which in the act follows the word creditors, namely, others, &c.; and he could equally claim it, notwithstanding the subsequent assent or payment of that creditor originally intended to be defeated, or whether he (the party complaining) had established or could eventually establish any just or lawful course of action or not, provided he merely asserted a claim which he desired to litigate under circumstances entitling him to attach the goods of the party under the incipient process; a party having no meritorious cause of action in point of fact, might take the goods out of the hands of the vendor, because such vendor acquired them by a transfer, fraudulent as against creditors and others who did not complain, and who, for all that appeared, might be content —a construction not warranted by any case or dictum I have seen. So far from declaring gifts and sales made for the purposes mentioned in the act void, universally, except only as between the parties colluding, the language of the act is quite the contrary, and imports that they shall be binding upon all except only that person or persons whose action or debt is delayed or defrauded, &c.—that person, in short, who complains, and adopts judicial steps to vacate the transfer, and who must, to do so, show himself to be a person expressly guarded by the statute, namely, a creditor, or another having a just and lawful cause of action hindered, delayed or defrauded. It is upon the principle of this construction, I take it, that a sheriff, having seized under a *fi. fa.*, is held bound to prove a judgment to sustain the writ; and were not this the true construction, I can perceive no good reason why such proof is required at all, and still less why evidence of the debt should be exacted in final process, and be excused upon a warrant of attachment. In either case, proof of an intent to defraud creditors generally (if there were any) would, without proof of any such creditors, make void the assignment, and the mere *claim* or *possession* of the assignee would shew the plaintiff in the process (be it mesne or final) hindered or delayed, if that be enough, without regard to the merits of his demand, or to the subsistence of any specific debt or debts liable to or intended

to be delayed or defeated. When the statute is urged in any case, the first inquiry, I think, is, whether the plaintiff falls within the description of a creditor or of another, and, as such, whether he is delayed, &c., by any feigned or covinous assignment? The next question would be, in which respect?—whether in his action, suit or debt? Upon final process, as upon a *fi. fa.* after judgment, he would be so delayed, hindered, &c., in his debt. If before judgment, as upon mesne process, he would be delayed, &c., in his suit. But in either event, he would be thus prejudiced as a creditor, and not as *another* than a creditor. A suitor other than a creditor might be equally delayed in his action under such circumstances.

It is well settled, that when goods are seized under a *fi. fa.* in the possession of a fraudulent vendor under the statute, the sheriff when sued, must not only prove the writ, but the judgment. In such a case, it cannot be said the action or suit is delayed, but that the *debt* is. It constitutes the case of a creditor hindered or delayed in his debt; and it would seem that the onus of proving him such creditor rests upon the sheriff, as a condition precedent to his right to buy the goods in controversy.

It is now to be examined whether a seizure under an attachment before judgment varies the case. It is to be premised that the reason why the sheriff justifying under a *fi. fa.*, must prove a judgment, is not because he can readily search and ascertain its existence, and which would be no good reason as applied to a sheriff in a remote district when the goods are about to be removed; but the reason is, that no right to seize subsisting, unless the plaintiff be entitled to the aid of the statute, he must, when prosecuted, shew him to be so entitled, at whatever inconvenience. I shall notice the only cases I have met with on mesne process, and enquire whether they vary the rule applied to *fi. fa.*, or can be distinguished upon satisfactory grounds.

Turvil v. Tupper, in Latch, is reported to be trespass for goods, wherein the defendant pleaded that the Earl of Southampton was seised of the manor of St. Giles, and that in the said manor there was a plaint against one Bangton,

and then issued an attachment against him ; and the defendant being bailiff, attached him by his goods, and shewed that the plaintiff claimed by action of a fraudulent gift *after action*. The plaintiff joined issue, and that it was made *bona fide*, and found for the defendant ; and the plaintiff took divers exceptions in arrest of judgment to the plea in bar ; and amongst others, that by the statute 13 Eliz., a fraudulent gift of goods should be void against a creditor, and that defendant had no right in law, because he was not a creditor, but an officer, and could not justify that this gift was by fraud, &c.—Latch, 222 ; 2 Roll. R. 493 ; Vin. Abr. Fraud F. Pl. II. ; Roberts, 578 ; Bac. c. 16, Fraud C. It was answered, that if an officer of justice was not protected, the statute would be of no force. It was held by two judges, that if a bailiff was not aided by the statute, no mesne process could be executed, and when the statute gave the principle it gave all the accidents.

In Roll, it is reported as trespass against Tupper for taking certain goods of plaintiff, and defendant pleaded that the Earl of S. was seised, &c., of the manor, &c., in which *he had a court Baron*, and one J. S. commenced an action of debt by plaint, against one Button, for certain money, and that an attachment was awarded by, &c., against B., directed to the defendant, being bailiff of the court ; and after, shewed that B. was owner of the goods, but he made a fraudulent gift to the plaintiff to defraud creditors ; and the said plaintiff claimed by colour thereof, being void by the 13 Eliz., and the defendant, by virtue of such attachment, took them out of the plaintiff's possession and impounded them, &c. The plaintiff traversed the fraud, and upon issue joined found for the defendant. 1st exception, that the bailiff was not a creditor and that the statute made the gift void against creditors, only, &c. It was said that the word only was taken only to exempt the grant ; and if the sheriff and bailiff could not advantage by it, the statute would be nothing, for the creditor could not avoid the gift but by course of law, which is to be executed by the officer thereof.

Upon this case, it is to be noticed that the principal ques-

tion turned upon another point, and that as respected the statute of Eliz., the main one was, whether under any circumstances a sheriff or bailiff could justify under it, they not being creditors. It was not in issue, whether the original plaintiff was a creditor or not ; the issue was special upon the fraud or *bona fides* of the gift, admitting the right to distrain in the former event. All was not in issue, as upon the plea of not guilty. Further, the defendant pleaded specially that the original plaintiff levied a plaint for certain money (*alleged to be due possibly*), &c., so that the plea contained all material averments. Yet the plaintiff in trespass did not question the debt, as he might have done—2 Mod. 195 ; Cowp. 18—but pleaded over, admitting it. Though not apparently expressly averred, it is involved and susceptible of being put in issue by plea. The defendant in trespass set out all the previous proceedings, on which the writ was founded. Other remarks, to follow the next cases, apply also to this. The attachment was against the person, to enforce appearance, not to cover the debt. It may have been after summons and a default, which might be regarded as to a certain extent proof of the debt of record, by implied admission in the default.—1 Lev. 47 ; 2 Lev. 85 ; 2 Saund. 150 a. ; 2 Esp. 47 n.

In Purdleton v. Gundon, 1 Star. N. P. C. 76, the plaintiff informed against the defendant upon the statute 13 Eliz., for that whereas the plaintiff had before brought a *plaint of debt* against J. S., in the Guildhall of Norwich, upon which issued, out of the said court, an attachment against the said J. S., by which the sheriff of Norwich, being ready by virtue of the said process to attach the said J. S. by his goods there, the now defendant, in disturbance of the said process and the execution of it, did publish and shew to the sheriff a conveyance, by which he claimed the said goods as conveyed to him by the said J. S., and averred the fraud, &c. ; and it was moved by Sergeant Snagg, that the matter of which the defendant is charged is not within the said statute, because the avoiding the said conveyance did not go in delay of the execution, for no judgment is given, but only in delay of process. But the court was clearly of opinion

to the contrary, and that by reason of the statute and the words of it, to wit, delay, hinder, or defraud creditors of their just and lawful actions, suits, &c., for here is a delay for want of serving the said attachment; the appearance of J. S. to the suit of plaintiff is delayed, which mischief is within the remedy of the statute. Of this case, as the other, it is obvious the debt is not in issue. The proceedings were set out and the opportunity offered to the defendant to contest it; but he seems to have waived it and rested upon the point, whether the facts formed a case within the statute. Neither of these cases therefore shew, that it was not incumbent upon the party seeking to avoid the sale, to aver expressly or impliedly the existence of a debt, or at least to afford to the party vendee an opportunity of putting it in issue. It might have been put in issue in each case, but was not. It was not objected that no sufficient averment thereof was made; and had it been expected, it would probably have been replied that it was sufficiently alleged as involved in the proceedings set out, to enable the opposite side to dispute it, and that if intended to be desired it should have come from that quarter. In any other point of view they seem inconsistent with the cases under *f. fa.*'s—more like the present, unless upon a ground to be hereafter mentioned.

In Creswell v. Coke, a suit for the penalty, by reason of the fraudulent alienation of horses, of which plaintiff was entitled to one as a heriot, the plaintiff's right is recited in full. The right is certainly the foundation of the suit, and traversable.—2 Leon. 8; Dy. 351, p. 723; Cro. El. 645.

In another case for the penalty, the debt is averred and proved.—4 Ea. I.

Of the foregoing cases, it may be remarked, that the necessity of averring or proving a debt might be dispensed with, on the ground that the proceeding was not at the instance of the suitor as a creditor, but as *another*, whose suit was delayed. The attachments did not issue because the plaintiffs were creditors, but because it was the process to bring the defendant into court.—*Gilb. on Distresses.* It might occur in a real action, and various other demands

not debts. In such cases and in that point of view the party could appeal to the act, as one whose suit was hindered or delayed ; it being a suit in which a debt was demanded, being an *accident*, and not the basis of the right.—Roscoe & Booth on Real Actions.

Such reason does not apply to the attachment here : none but a creditor is entitled to it ; and it is only by reason of his being a creditor that he can procure any such process. It is true, one object of it is, to enforce an appearance by bail ; another is, to secure the goods, to arrest a judgment for the debt ; and only in order to secure a debt can it be restored to. Then, in sound reason, under what head is a suitor by attachment under one act to be classed, in 13 Eliz. c. 5, that of *creditor or other?* Doubtless of creditor, for no other can avail themselves of the remedy. If a debt need not be proved, still, to render the present case parallel with Turvill and Tupper, the antecedent proceedings should at least have been shewn, and the issue be narrowed so as to elude the question of debt or no debt. The essential previous proceedings to warrant the writ should have been shewn, notwithstanding in many other cases they would be presumed, or might be dispensed with. This production, however, would not meet the difficulty.—10 B. & C. 202 ; Bull, N. P. 23 ; 3 T. R. 183.

Again, supposing the sheriff had abstained from seizing, and upon returning *nulla bona* the plaintiff had prosecuted him for a false return ; to sustain his right to have seized the goods surely he might have proved that he was a creditor of the vendor. He could not, by bare proof of the attachment and an assignment fraudulent quoad creditors, have recovered damages of the sheriff. In the case of an escape, after an arrest upon a *ca. re.*, the plaintiff must prove his cause of action *a fortiori*, in a case under the statute.—2 Lev. 85 ; 4 T. R. 611 ; 2 Esp. 72 P. C. 476 ; 1 Brown, 183, 118 ; Cro. El. 188 ; Keb. 785 ; 3 Mod. 324 ; Cro. Jac. 3-289 ; 3 B. & A. 502 ; 2 Bl. R. 845 ; 3 Wils. 345 ; Yel. 42 ; 2 Buls. 62 ; Carth. 148, 4 Camp. 590 ; 4 Price, 13 ; Cro. El. 576 ; Bridgm. 6 ; 1 Sal. 273, 319 ; 5 Mod. 204 ; 1 Lutw. 121 ; 15 Ea. 615 n.

It is true that at *nisi prius*, the sheriff or another cannot contest the *regularity* of the writ or judgment; but the *regularity* and *existence* of any previous necessary proceeding, are different things. It does not follow, because in the present case the plaintiff could have contested the *regularity* of the affidavit of *debt*, or *absconding* of the debtor, &c., it was therefore unnecessary to produce any affidavit at all, or to prove a debt. It would seem the affidavit need not be proved in an action against the sheriff; and if not, I do not see that he could be called upon to prove it in his justification. But this would not in either case dispense with the necessity of proving the debt.

Again, supposing the original plaintiff were the now defendant, would the writ alone protect him, or must he have shewn a debt? He surely must have adduced in his justification proof, to bring himself within the statute. It is no sufficient answer against it, that in justifying an arrest under a *ca. re.*, he need not state the *cause of action*; then it is *inter partes*; no stranger interposes. But even then it would seem essential to aver an affidavit of debt, expressly or with certainty, to a common intent, justifying the indorsement for bail and subsequent arrest. Sometimes, between the original and same parties, more is required of the original plaintiff than of the sheriff or a stranger: sometimes the one must shew a judgment, when the other need not, for reasons not influencing the present question.—1 Sal. 408-9; 6 M. & S. 110; 1 Leon, 55; 3 Lev. 20; 2 Star. N. P. C. 198; Holt, N. P. C. 587.

And as respects the affidavit of debt between parties, it is not traversable—it is equivalent in its operation to the proof of a debt upon a trial at *nisi prius*, not so when strangers are interested and concerned.—3 M. & S. 155; 9 B. & C. 543; 10 B. & C. 703.

If upon the whole, the original plaintiff must, as a defendant at the suit of the fraudulent vendor, or as a plaintiff against the sheriff, prove himself a creditor, it seems to follow, a like burthen devolves upon the sheriff when he seizes and is a defendant at the suit of the former. However hard it may be to prove a debt in the absence of any

judgment, it forms a condition precedent to the right to seize; and he must be prepared to do so, unless he could prevail upon the court to stay the trial till the plaintiff had obtained a judgment. He is in no worse predicament if there be no debt to support an attachment, than if there be no judgment to support a *fl. fa.*; and in either case he assumes the onus when he ventures to levy. A good rule may be drawn from proceedings in bankruptcy. The assignees claiming under a statute, must bring themselves within it by proving, amongst other things the existence of a debt at the time the act of bankruptcy was committed. By express provision, the affidavit of a petitioning creditor is conclusive, unless notice be given of a design to dispute it; but the general rule that a debt must be proved, is clear. Fraudulent alienations frequently constitute an act of bankruptcy, but then the fraud can only be established by proof of a creditor to be defrauded.—1 M. & M. 24; 4 Bing. 34; Holt, 190; 2 Star. E. Bankr.; 1 Bing. 426; 8 Moore, 539; 2 B. & B. 560.

The attachment law, 2 Wm. IV. c. 5, only enables those to whom the fugitive is indebted to apply for an attachment.

The defendant must rely upon one of two grounds 1st, That there was no change of property; 2nd, If there was, that the rule was void quoad creditors; and in the latter event, he should prove—1st, That a just and lawful suit by *another* than a creditor was delayed; 2nd, That the original plaintiff was a creditor, whose just and lawful suit or debt was delayed. I am of opinion that it was competent to the sheriff to seize these effects as Lowry's under the attachment, but that it was incumbent upon him to prove the debt in his vindication, not a judgment, for none could have been obtained but by extrinsic evidence. So that, as the case was treated at the trial, the defendant ought to have established the cause of action of the plaintiff in the attachment; and, restricted to the view then taken, the verdict is consequently unwarranted. Under our attachment law, I have already said, none but a creditor could arrest the goods, if virtually transferred; and in such an event, his debt must be proved, and this not merely by the

affidavit of debt (although at *nisi prius* the regularity of the proceedings cannot be questioned or tried), but by sufficient legal evidence *aliundē*: and if upon the evidence in this case the most reasonable and just inference is, that an actual sale took place, though to defraud creditors, it could not have been properly left to the jury to infer that all was colorable, and that no such sale at all was designed or accomplished; that the defendant could only impeach it in behalf of a creditor, and to that end he should have shown a debt existing. I should have been satisfied with the present verdict upon either ground, had both been, with *propriety*, taken and considered by the jury. However, cases of this kind are generally rested upon the statute, and are not now disposed of at common law. Doubtless, when the debt can be proved, the statute affords the surest protection; and as most questions arise under final process, difficulty seldom exists in proving the debt by a judgment of record. The books afford few, if any, adjudged cases exclusively at common law, since the statute; and Martin v. Podger, it is obvious to me that the court laid much stress on the circumstance, that apparently there had been no change of possession. Upon the whole, though I should not have disturbed a verdict for the defendant, had the jury been called upon and pronounced this fraudulent assignment to the plaintiff feigned and void in the abstract, yet, as its validity *prima facie*, was not, and I think, could not, be questioned at *nisi prius*, but was impeached solely as invalid against creditors under the statute, I think a new trial should be granted. At the next investigation if the defendant chooses to rest the case at common law, we shall have the opinion of the jury upon the question of sale or no sale; or if he proves a debt, to warrant the attachment (which would be the most unexceptionable, and in my opinion the only proper course), my impression of the merits, as at present disclosed, would lead me to approve the same result that (under my erroneous view of the requisite legal evidence) attended the late trial. I regard the transfer fraudulent and void as against creditors and others, under the statute, if there are any entitled to urge it; but at the late trial no proof was offered

that the plaintiff in the attachment stood in such a situation ; wherefore, I deem the defence not sufficiently established.

Per Cur.—Rule absolute, without costs.

MCNICOL V. MC EWEN.

When on a dissolution of partnership, one partner has admitted a balance, assumpsit will lie, although there is no promise to pay ; and in one case, where the balance did not appear conclusively, and the judge at *nisi prius* left it to the jury more unfavourably for the plaintiff than he might have done, and there was a verdict for the defendant, a new trial was granted on payment of costs.

Assumpsit. The plaintiff and defendant had been in partnership, having two separate establishments, conducted under different names, and upon a dissolution had referred all matters to arbitrators. An award was made, but not in conformity with the submission ; wherefore it was invalid, and not binding upon them. Failing to procure the reception of the said award in evidence in this cause, the plaintiff sought to support the count upon an account stated, by the production of various papers obtained from the representative of the referees, who had died, and which it was said had been found amongst the papers.

No. 1 of these, proved by a clerk of the parties to be extracted truly from the books of the concern (such books being called for from the defendant, who withheld them), was as follows :

“ Statement of McNicol and McEwen’s books, 1st December, 1848.

To account of stock on hand.....	£	504	10	9½
Amount of outstanding debts.....		2325	14	7½
Potash establishment.....		287	1	6

		3207	6	6
Debts owing.....		2100	4	11

		£1107	1	7

The above is a just statement of McNicol and McEwen’s affairs. A. McEwen’s private account is included in the above account.

(Signed) THOMAS MCCOSH (the Clerk.)

Donald McNicol & Co., St. Andrew’s, owes a balance,

on 1st December, 1828, to McNicol and McEwen, and charged in the above account 34*l.* 14*s.* 5*d.*

(Signed)

THOMAS MCCOSH."

£	1107	1	7
	34	14	5
	<hr/>		

£1072 7 2

No. 2. An account.

Messrs. McNicol and McEwen in account with
Donald McNicol & Co.

Balance..... £ 202 1 3

No. 3. A memorandum, in the handwriting of defendant.

At Milleroche, 1st December, 1828.....	£1072 7 2
Deduct J. R. McDonnell's note.....	500 0 0
	<hr/>

½)570 7 2

½ profits at Milleroche.....	286 3 7
Deduct ½ profits at Williamstown.....	223 10 0
	<hr/>

By D. McNicol's private account	62 13 7
By D. McNicol & Co.'s account current.....	145 0 0
	<hr/>

Deduct ½ of J. R. McDonell's note.....	202 1 3
	<hr/>
409 14 10	
250 0 0	

Due D. McNicol	£ 159 14 10
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No. 4. A small account of 2*l.* 11*s.* 10½*d.* of Donald McNicol to A. McEwen ; and two sketches, apparently memoranda of the arbitrator, in which all the four previous statements and accounts are introduced. Upon these exhibits, and especially the statement or memorandum No. 3, the plaintiff principally relied, as proving an admission to the extent of 159*l.* 14*s.* 10*d.*, recoverable on the account stated ; or at least the 145*l.*, the amount of plaintiff's private account, which account was not produced or otherwise proved.

Macaulay, J., who tried the cause, left the evidence to the jury, but with remarks calculated to discourage them finding for the plaintiff, owing to the unsatisfactory account given of the origin of the paper No. 3, and its discrepancy, compared with others. It was not thought safe to rely upon it as the deliberate admission of the defendant to that extent, though the plaintiff claimed much more. It might

as fairly be regarded as a statement, shewing in figures on paper the balance that would be due upon the collection of all debts on one side, and the payment of all on the other, a scheme of adjustment in short, as a deliberate admission of so much due and payable by the defendant to the plaintiff in each. The supposed profit at Milleroche might never accrue. The jury found for the defendant; and *Draper*, in Michaelmas term, obtained a rule nisi to set aside the verdict; *Sullivan* shewed cause.

ROBINSON, C. J.—In this case, we are of opinion that the ends of justice will be best attained by granting a new trial. When it happens after the dissolution of partnership, that one of the partners, upon a final settlement of accounts, acknowledges himself to be indebted to the other in a specified sum, as the result of their former joint dealings, there can be no doubt that the justice of the case would hold him liable to pay the balance, although he may make no express promise; and in this province, where there is no equitable jurisdiction there is the greater reason for supporting the legal remedy to the full extent. 2 T. R. 480. Looking at the case of *Foster v. Allanson*, and the language of the books generally on the subject of the liability of partners to each other after the dissolution, I should have supposed that some promise to pay was necessary to sustain the action of *assumpsit*; but according to the report of the case cited from Holt's *Nisi Prius Reports*—Holt's N. P. C. 368—we have the authority of Chief Justice Gibbs for holding, that when a balance has been ascertained and admitted, an action will lie without evidence of promise, for the promise will be implied.—8 B. & C. 20; 2 M. & R. 166. As this is in accordance with the justice of the case, I readily acquiesce in it. The judge at the trial yielded to the authority of this case, and directed the jury accordingly; so that in this respect there was no misdirection. But it seems to us that the jury were left to decide upon the fact, whether a balance had been conclusively admitted by the defendant, under a change more unfavorable, perhaps, to the plaintiff than was necessary; and if the plaintiff chooses to take a rule for a new trial, upon payment of costs, we think he should have it.

It is possible some further light may be thrown upon the case, after the knowledge which each party now has of the facts relied on ; and if no additional explanation is afforded, the jury may think the documentary evidence which was already produced, sufficient to satisfy them that the defendant conclusively admitted a balance due by him upon a final settlement of accounts.

SHERWOOD, J., concurred.

MACAULAY, J.—As the rest of the court are disposed to grant another hearing in this case, I have no objection to concur on payment of costs, rather in the apprehension that the merits are in reality with the plaintiff, than from a conviction that both the court and the jury did not take a sound view of the case at *nisi prius*, under the evidence then submitted.—1 M. & R. 518 ; 7 B. & C. 623 ; 1 M. & M. 139 ; 3 C. & P. 85-89 ; 3 Bing. 170-377 ; 1 R. & M. 239 ; 2 C. & P. 403.

Per Cur.—Rule absolute, on payment of costs.

DOE EX DEM. MOAK V. EMPEY.

The possession of a mother will not be considered tortious, as against the heir, being her own child, but will rather be treated as the possession of a guardian.

If on the death of a tenant at will, his heir enter, such an entry is tortious ; and if the heir die, and his heir enter, the original owner or his heir will be put to a right.

Ejectment for east half of lot No. 15, in the third concession of Osnabruck. It appears that one Philip Servos, since deceased, was the original nominee of the crown, but no patent was produced. He died intestate, between thirty and forty years ago, leaving a widow and child him surviving. After his death one Wart purchased the premises of his widow for a cow ; but no written contract was produced, though there was some indistinct allusion to some such document. Wart sold to Philip Moak, the father of the lessor of the plaintiff, who took possession and improved it ; and afterwards he went with Wart to the heir-at-law of Servos, and requested a conveyance, which the heir declined, executing, unless Wart paid more for the property. No written contract between Wart and Moak was produced. Moak continued in possession, and after holding three or four years, died, leaving a widow and several children

residing on the adjoining lot No. 14, the west half of which he drew from government. The eldest son John afterwards worked on the premises and died intestate. His eldest brother Martin succeeded him in the possession of the property, and also worked on it ; he died intestate. The lessor of the plaintiff was his heir, being the third son of Phillip Moak, the father. On the part of the plaintiff it was in evidence that after the death of Martin, the plaintiff was in possession of the east half of No. 15, and lived on it with his mother, until put out by the sheriff upon judgment by default in ejectment, brought by the plaintiff against him ; that the mother had tenants on the land, the lessor of the plaintiff being under age eleven or twelve years old), and that no one else had possession ; that the widow Moak had married one Rombaugh, and after his death lived on No. 15, whereon she built a house.

On the defense, it was proved that Jacob Servos, the heir of Philip Servos, died intestate, leaving Peter his eldest son and heir him surviving. It was also in evidence, by oral testimony only, that many years ago—before the last war—Mrs. Rombaugh (formerly Moak), during the life of Rombaugh, purchased the lot of Jacob Servos—she paying a portion of the purchase money—and that Jacob would not have conveyed the estate upon the original contract made by his mother with Wart. It was proved that the last payment, of 6*l.* 5*s.*, was made by Mrs. Rombaugh. By deed of release, dated 28th January, 1830, Philip Servos, the heir of Jacob, released the lands to Mrs. Rombaugh ; and on the 15th of February, 1831, she conveyed the front seventy acres to the defendant.

Macaulay, J., who tried the cause, charged the jury, that if upon Philip Moak's death the heir entered, and upon his death then his heir, and eventually the plaintiff succeeded as heir of the person last seized, and that the possession ran with the descents until the plaintiff was dispossessed by the sheriff recently, to find for the plaintiff : but that if after the death of Philip Moak, his widow purchased of Jacob the heir of Philip Servos, whose right Moak had recognized by demanding a deed of conveyance from her, and took

possession under such circumstances that they only lived with her as inmates of her family, being dispossessed, and she only possessed thereof—that the would in such case seem to have been in a situation to accept the release from the heir of Jacob Servos, and in that event to find for the defendant. A verdict was rendered for the plaintiff; and in Michaelmas Term, *Baldwin* obtained a rule nisi for setting it aside, upon the ground that as all parties claimed under Philip Servos, a good title was proved in the defendant and widow Rombaugh. *Draper* showed cause. Upon the argument the following questions were made :

1st, Was it necessary to shew the government patent—the presumption upon the evidence being that it had never issued?

2nd, Did Philip Moak in his lifetime, and if so, did his sons in their several successions after him, hold under the heirs of Philip Servos; or did the possession of any of them constitute an abatement or intrusion, followed by a possession of twenty years' adverse holding, so as to toll the entry of the heirs of Servos—in other words, had those holding by descent under Moak acquired a title by wrong?

3rd, Was the widow Rombaugh in possession merely on behalf of her children, the heirs of Moak; or had she dispossessed or disseised them, so as to enable her to accept a lease; and did she acquire a verbal title under the release proved?

It was contended on her behalf, that Philip Moak was by his own act a tenant at will or sufferance to Jacob Servos, and consequently that upon his death no descent was cast; and that the widow Rombaugh having afterwards usurped the possession, was capable of taking a release from the heir of Jacob, though he had not entered into actual possession.

It was answered, that however Philip Moak might have been a tenant at will to Jacob Servos, such will determined upon his death, and that his heirs became abators of the heirs of Servos; and that any possession of Mrs. Rombaugh was as quasi guardian of her minor children, and not adverse; that in truth, by long adverse possession, the

heirs of Moak, and last of all the plaintiff had, acquired a right by wrong to the possession of the estate, as against the heirs of Servos ; and that the widow had no possession upon which a release could operate : that the circumstance of her acting in concert with Wart, shewed that she availed herself of his original agreement for the lands, and evinced her design of supporting the contract made with him by her former husband, rebutting the presumption of her purchasing adversely to her children ; and that the sense of the jury was in favour of the plaintiff's claim, and against the pretensions of the mother and the defendant.

ROBINSON, C. J.—There is reason to believe that in reality no patent for this land has ever issued ; therefore, let this action terminate as it may, the result is immaterial as it respects the title ; for the commissioners will award that as they see fit. It is a mere contest about possession, in the meantime, and the costs are also at stake. Under such circumstances, I would not protract the litigation by disturbing this verdict, unless it appeared clear upon examination that it was rendered against law, either by the jury disregarding a proper direction from the judge upon the law of the case, or in consequence of the judge having taken an erroneous view of the law at the trial. I do not see cause for interfering, upon either ground. The jury were directed to find for the plaintiff or defendant, according to their view of the evidence as establishing certain facts, and they found for the plaintiff—thereby affirming their conviction, as I consider, that after the death of Phillip Moak intestate and in possession, his three sons in succession entered and were possessed, taking by descent, the last being the present lessor of the plaintiff ; and they negatived the supposition that the widow of Moak disseised his heir and held adversely in her own right. They took, I think, the just view of the case as between the widow and the heir and such as is agreeable to law—considering the mother the natural guardian of the heir, and bound to protect his inheritance, and not to defeat it. I am of opinion that there is no ground for disturbing the verdict.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—Both parties claim under Servos, the original nominee ; his title therefore need not be proved in this suit between these parties. Admitting that Phillip Moak, who took possession under Wart, who bought of the mother of Phillip Servo's heir, and afterwards applied to him for a title, was tenant at will to such heir, such will determined at the death of Phillip Moak. The entry of Moak's heir was therefore tortious as to the heir of Phillip Servos, admitting him to be seized in law and deed by the occupancy of the tenant at will. When such heir died and was succeeded by his heir, it would seem that the heir of Servos was disseised and put to his action, if the entry was not told by the descent cast. After the death of Jacob Servos, the heir of Phillip Servos the heir of Jacob Servos, succeeded to the right only of an ancestor disseised.—Cow. 217; Cro. Car. 203; 3 Will. 514; 0 Rep. 106 a.; 7 T. R. 390; 1 East. 568; 10 East. 583; 10 B. & C. 816; Shpd. Tch. 325; 4 Cruise, 160.

It would seem that the possession of the mother, during the minority of her son, would be held *prima facie* a possession for him, as his guardian, and there is no evidence of any disclaimer or disseiser of her son, the plaintiff, by the mother ; at all events, the jury have found the contrary, and under such circumstances she would not seem clothed with any possession on which a release could operate to enlarge the estate or *mitter le droit*. There was evidence of a disseisure or abatement, from the long possession of the heirs of P. Moak, and no sufficient evidence of possession in the widow to support a release. The former ejectment shewed that defendant admitted plaintiff to be in possession formerly. If the heirs of Moak had recognized the right of the heirs of Servos, their possession might be regarded as equivalent to an entry, at the election of such heirs of Servos.—Cowp. 217; 1 Ea. 574; 1 Burr. 111.

Per Cur.—Rule discharged.

DOE EX DEM. ARMOUR V. MC EWEN.

A debtor in possession of lands which have been sold for his debt at a sheriff's sale, is quasi tenant at will to the purchaser, and cannot dispute his title; and a third person defending as landlord, but showing no privity between the debtor and himself, nor any connection with the debtor's title, stands in the same relation to the purchaser, as the debtor himself.

Ejectment for No. 37 in the 1st concession of Cornwall.

Plaintiff's case consisted of—1st. An exemplification, at the suit of the defendant, against Stephen Brownell, the tenant in possession; entered 7th July, 1829. 2. A writ of *f. fa.* to the sheriff of the Eastern District, against the lands of S. Brownell; tested 9th January, 4 Geo. IV.; received by sheriff, 6th April, 1830. 3. A sheriff's deed of the lot in question, as sold under such *f. fa.* to the lessor of the plaintiff, for 330*l.*, dated 2nd July, 1831. It was further proved that Stephen Brownell still lived on the premises; that he was the son of Joseph Brownell, jun., whose heir at law he is; that Joseph Brownell had been in possession 38 or 39 years; and that when he died, four or five years ago, his son Stephen entered as his heir, and has remained in possession ever since. That there were two Joseph Brownell's—father and son. One witness said Joseph Brownell, jun., was in by his father's consent; another said that he never understood he occupied the lot, except as owner: that Joseph Brownell, the elder, and one John Melross, purchased a tract of land together of one Law, of which No. 39 is a part, and which the former said he wanted for his son Joseph, who received possession accordingly; that after Joseph the son became addicted to drinking, his father, under whom the former went into possession, said he would reserve the lot for the children; that Joseph the father, died in 1822: that the lot was always considered as Joseph's, the son's, who lived upon it, and claimed it, and who was a younger son. It was said that Joseph the father, had asserted claim to the lot about 1816, having a patent for it. It was also proved that, before action brought, the lessor of the plaintiff sent an agent to the tenant, Stephen, to try and persuade him to give up possession, which he refused, and abused the messenger,

A nonsuit was moved on the following grounds: 1. That

no return of the *fl. fa.* against lands was proved. 2. That the registry of the sheriff's deed was not proved.

Macaulay, J., who tried the cause, overruled the objections. A return was attached to the writ, and the deed was certified to be registered the usual way.

On the defence, a goverment patent to Joseph Brownell was produced, dated 2nd July, 1808; for Nos. 34 and 37 1st concession, and No. 37 and west half No. 35, 2nd concession, Cornwall, nine hundred acres. The will of Joseph Brownell, sen., was proved, made in 1821, and devising another lot by name, and all his other lands to his wife for life, remainder to Stephen, his grandson (not the tenant in possession), a son of Stephen, the eldest son and heir-at law of Joseph Brownell, sen. No entry of the devisee was proved ; but it appeared that Joseph the son, remained in possession till he died, when he was succeeded by his son Stephen, the present tenant. It was stated by some of the witnesses, that Joseph the father, had at times offered to sell a part of No. 37, seventeen years ago. The possession of the patent was obtained by one of the executors from his widow, after his death. Joseph the son, had been heard to say that there was a mistake in the patent, which should have been to him. The tenant in possession afterwards had this patent for some months, but did not claim it as his ; but his father Joseph (the son) resided on the lot, as his own, after the death of his father ; and when he died, his son (the tenant) succeeded him, though the executor thought Joseph the son, held all along under his father. Joseph the father, had, when angry, threatened to dispossess Joseph, jun., to forbid his using the place, and to sell it, but never executed any such purpose. It appeared from evidence in reply to the defence, that there had been some collusion or shuffling respecting the government patent. It was said the word "elder" had been added to the name of the grantor, and afterwards erased. That the grant had been produced to the witness by Joseph the son, who conceived that the word "elder" had been added, in the apprehension that without it the former would hold the estate, and to deceive creditors of Joseph the son. The jury were

instructed to find for the plaintiff, on the ground that the tenant in possession is the debtor whose property the land was sold under execution, at the suit of the present defendant, who defends as landlord, but who did not appear to have any interest whatever in the premises. That as he did not appear to be the landlord of the tenant, either before or after the sale, the tenant was in this action to be regarded as the substantial defendant; and that being the original debtor, he could not question the plaintiff's title, to whom, as purchaser at sheriff's sale and holding a title acquired by operation of law, he the tenant was to be regarded as *quasi* tenant at will. The jury were also requested to find whether, from the death of Joseph the father, his son Joseph and his heir, the tenant in possession did or did not hold adversely to the devisees of the original grantor, admitting him to possess a disposing power over the lands in dispute. The jury found for the plaintiff, that the original debtor still continued in possession, and that he and his father had since the death of the original grantor, held adversely to devisees.

A new trial was moved for in Michaelmas term last, on the ground of misdirection, by *Baldwin*. *Draper* shewed cause; and the following points were raised upon the evidence. 1. Could the tenant dispute the plaintiff's title? 2. Could the defendant, as landlord, do so? 3. In either case does the evidence shew title out of the tenant, at the time of the sale? 4. How far the devisees of Joseph Brownell, sen., were disseised, or their entry tolled, by a descent cast.

ROBINSON, C. J.—It is only necessary to state the case, to shew that this verdict ought to stand. As to the entry of the devisee being tolled by the descent cast, a question might arise upon the distinction taken in Co. Lit. 240 b. and 7 Ea. 318; still there would remain the question, whether there has not been such a possession of 20 years as would confer a title under the Statute of Limitations; for clearly the evidence would justify the jury in concluding that Joseph Brownell, jun., entered into the land as his own (though it was with his father's acquiescence), and

not as holding under his father. But I am of opinion, upon the principle stated in a judgment of this court, in *Doe ex dem. Dennis v. Maguire*, that the debtor, Stephen Brownell being really in possession, ought to be regarded as the defendant in this ejectment ; and that *McEwen*, though he obtained leave to defend as landlord, having offered no proof whatever of privity with the title, or his relation as landlord with the tenant in possession, stands before us as a stranger urging objections to put the purchaser at sheriff's sale to the proof of title, when the debtor really in possession could not be admitted to do so. The case, I think, ought to be dealt with as if the debtor were the person defending, and therefore in any view of the case the verdict appears to be proper.—*4 M. & S. 348 ; 2 T. R. 55.*

SHERWOOD, J.—Of the same opinion.

MACAULAY, J.—The debtor (the tenant in possession) is *quasi* tenant at will to the plaintiff, and a tenant cannot dispute his landlord's title as a general principle.

The defendant and tenant are identified in point of interest by the consent rule ; and the defendant does not appear to be landlord at all, unless the tenant has occupied a lease under him since the sale ; in which case he could not resist the plaintiff's title. Admitting that Joseph the son was tenant at will to his father, such will determined at the death of the father ; and the jury have found that after his death, the former continued to hold adversely to the devisee, constituting a *deforcement* ; subsequent to which, a descent was cast upon the present tenant, who holds as heir of Joseph the son, who deforced the devisee to Joseph the father, and who died in adverse possession. There was evidence of such adverse holding, and the jury have so found. Possession ostensibly as owner unexplained, is *prima facie* evidence of seizure in fee ; and such presumption is not rebutted in this case, admitting that it is competent to the debtor in possession to show title out of him. He shews the devisee deforced, no subsequent entry, and a descent cast.—*6 M. & S. 110 ; 6 B. & C. 41 ; 2 Star. N. P. C. 199 ; 2 M. & S. 565 ; Bull, N. P. 103 ; 10 B & C. 816 ; 8 B. & C. 717 ; 2 Pres. Abst. ; Pres. 300 ; Co. Litt. 111 a. ;*

Co. Litt. 277 b.; 3 Leg. Ob. 77; 2 C. & J. 71; Holt, N. P. C. 589.

Per Cur.—Rule discharged.

DOE EX DEM. JANE TAYLOR V. PETERSON.

Where a testator, after devising to his wife for life all his real estate, stated the lots of land of which it was composed, and amongst others the front half of a lot, of which only the rear half belonged to him: *Held*, that the wife took a life estate in the rear half, under the general terms of the will.

Ejectment for the rear half of lot No. 37, in the ninth concession of Elizabethtown. The plaintiff's title consisted of—1st, An indenture of bargain and sale from Conrad Peterson, defendant, to John Taylor, dated 30th May, 1812, whereby, in consideration of 100 l ., he conveyed to the bargainer in fee the land in question—the deed was duly registered 11th September, 1816; 2nd, The death of John Taylor; and 3rd, His will, dated 3rd March, 1829, whereby he devised to the lessor of the plaintiff "all my real estate, to hold to her sole use and benefit during her natural life; being lots Nos. 28 & 29, in the fifth concession, and the *first or south* half of lot No. 37, in the ninth concession of Elizabethtown;" and after her decease devising the said lands to "my natural daughter, Mary Taylor, by Sarah Peterson, to hold to the said Mary Taylor (after the decease of my wife Jane), her heirs and assigns forever. Giving also to the said Mary Taylor a sum not exceeding 10 l . annually, to be paid to her guardian, to be legally appointed, for her support and education, during the natural life of my wife." Household furniture was bequeathed to the wife, and out of the personal estate funeral expenses and all debts were to be paid. The personal effects not before bequeathed, were to be converted into money; and it, with what money testator had at his decease, was to remain in the custody of his executors, they paying the interest thereof to his wife, during her life, after paying the sum before-mentioned to Mary Taylor. Residue of personal estate, upon death of Jane, is bequeathed to Mary Taylor. The wife not to cut oak timber on the lands. If Mary died without issue, said real estate to be held in fee by his niece Mary Hunt. Registered 14th August, 1832.

It was also proved, on behalf of plaintiff, that the defendant was in possession of all lot No. 37; that he had been heard to admit his having given a deed to John Taylor; that the defendant had been in possession of the front half of the lot in question for twenty-four years; that he still lived upon the premises; and that his present dwelling house was on the rear half of the lot, near the place where the old one stood; and that the said rear half was improved, to what extent not appearing.

A nonsuit was moved for, on the ground that the will devises the front or south half of the lot, and not the *rear* half of the lot, the latter being the premises claimed. It was answered, that the testator devised *all his real estate* to his wife, to hold to her sole use and benefit during her life; being the two full lots, and the front or south half of No. 37; under which circumstances, the rear or north half would be included under the general expression, "all my real estate;" or if not, that the testator, having no claim to the half lot mentioned, but to the half omitted, and obviously designing to devise his interest in half that lot, and not to die intestate, there was an obvious mistake in the will, curable under the doctrine of *ambiguitas latens*. The defendant then offered matters of defence, which were overruled; and a note of his exceptions was made at the time, as follows:—Defendant offered and was prepared to prove, 1st, that the testator, under whom the lessor of the plaintiff claims, admitted and stated to the witness, that the deed of the lands was taken as a mortgage, to secure a sum of money loaned by the testator to the defendant; 2nd, That the testator considered and admitted that the moneys so loaned and secured had been paid and satisfied by the defendant, by the defendant having brought up, supported and educated an illegitimate child of the testator, by the body of the daughter of the defendant, without being in any way compensated; 3rd, That the defendant had been in possession of the land more than twenty years before the commencement of this suit, and up to the time of the commencement of this suit, with the knowledge and assent of the testator, who had repeatedly declared that the defendant

should never be disturbed. The jury were instructed to find for the plaintiff, if satisfied that the testator made a mistake in his will; but if not, then to find for the defendant. They found for the plaintiff; and on Michaelmas Term, *Bidwell* moved to set it aside, upon the grounds urged and over-ruled at the trial, namely, the construction of the will and the points arising out of the defence offered. *Draper* shewed cause, arguing that the words all my real estate, include the premises claimed, notwithstanding the enumeration of the lots following the declaration of the lessor of the plaintiff's interest in all the testator's estate. That there is an ambiguity in the will, an *ambiguitas latens*, susceptible of being obviated by proof, shewing that the testator had no claim to the half lot mentioned, but that he did own the half omitted, and no more, and that the evidence offered was wholly inadmissible. On the argument, the first and second points raised at the trial were abandoned; and the case was rested on the construction of the will and the third ground of defence. *Cur. adv vult.*

ROBINSON, C. J.—The first question is, can the rear half pass under this will, or is the devise of all his real estate restricted by the subsequent specification of the parcels.—7 *Ea.* 321; 1 *Ea.* 456. I think clearly the rear half passed by the will; so clearly that it is not necessary to refer to authorities. On the 30th May, 1812, defendant conveyed to John Taylor the rear half of No. 37, now in question, but continued to live on the land himself, and had a possession uninterrupted for more than twenty years, with the knowledge and assent of the testator, who had in that time repeatedly declared that the defendant should never be disturbed. And this gives rise to a second question—Does not the Statute of Limitations protect such a possession?—11 *Ea.* 246; 3 *Taunt.* 147.

The Statute of Limitations clearly cannot avail the defendant here, for he shews on the trial that his possession did not commence adversely, by setting up that the conveyance was a mortgage, and claimed right to prove that he had satisfied it by a service rendered to the grantee or

mortgagee. He cannot, after this admission, be allowed to say that he entered claiming adversely, and held the grantee at defiance.

If the case stood upon the bare fact, that at any time after Taylor became seised of the land (although it was under a deed from Peterson), he said to Peterson, you may go into possession, or you may remain in possession, I will never disturb you—I will not say that twenty years' uninterrupted possession by Peterson would not bar Taylor's right, because that is an admission that he is in, after such a declaration, upon his own right, and holding as his own, not under Taylor. It might be argued, I think, that a gift of land by word only, after twenty years' possession, requires no deed to support it. If Taylor had said you shall not remain there, I will dispossess you, but had nevertheless not done so, but had allowed an uninterrupted adverse possession of twenty years, the statute, I think, would have applied ; and I cannot readily assent to the position, that he derives a right now to turn him out, after that lapse of time, from the fact that he told him he *never would* do so. I notice this only as it may bear upon a similar question in other cases. His own declaration at the trial, that he was in fact a mortgagor in possession, but the idea of an adverse holding out of the question.

SHERWOOD, J.—Upon the first question raised, that the premises in question were not devised to the lessor of the plaintiff by John Taylor's will, I think the mistake in the description of the estate is unimportant, and that the lessor of the plaintiff took a life estate in all the lands the testator owned in fee at the time of his death.—12 Mod. 594; 5 Burr. 2638; 1 T. R. 411; 5 Taunt. 410. It is impossible for any person to use more extensive and comprehensive words to devise his lands than the terms adopted by the testator in the will he made, and upon which this action is brought. Lord Coke defines the word estate in the following manner :—“*Status dicitur a stando*—because it is fixed and permanent. The word estate signifieth such inheritance, freehold, term for years, tenancy by statute, merchant staple, elegit, and the like, as any man hath in lands and

tenements, and by the grant of his estate as much as he can grant shall pass."—Co. Lit. 345 a.

The testator clearly expresses his intention to give all his real estate to his wife during his natural life; and as nothing subsequently appears in the will to narrow the meaning of these words, or restrict their application to any lots or parcels of land which the testator owned, and as the front half of lot No. 37 is not specially devised to any one, I think the sound construction of the will to be, that the testator intended to devise all his lands to his wife, and consequently the premises in question passed to her by the will.

The second objection was, that the deed from the defendant to Taylor was intended for a mortgage, and that the debt was satisfied in manner stated. This evidence, I think, was inadmissible.—3 Wils. 273 : Cowp. 47.

The third objection was, the action of the lessor of the plaintiff is barred by the Statute of Limitations. Under the circumstances of this case, I consider the defendant in the same situation, as to his possession, as a mortgagee after the time allowed by the mortgage for the payment of the debt has elapsed. Such a mortgagor is not a tenant at will; he is no more than a tenant at sufferance, and takes the profits of the land by the implied authority of the mortgagee.—Doug. 22 ; Ea. 448.

MACAULAY, J. I am of opinion, the possession of the defendant was not adverse to the plaintiff's testator; and that, either by reason of the comprehensive terms of the will, or upon the principle governing cases of *ambiguitas latens*, the half lot in controversy may be well held to have passed to the donee. The portion erroneously specified is introduced by way of *explanation*, and not of *restriction*, or *necessary description*, and may be *rejected* or *rectified*.—1 Bull, 117 ; 2 Bull, 176 ; Cro. Car. 129 ; W. Jon. 195, 379 ; Cro. Car. 447, 473, 546 : 1 Lord Ray. 728 ; Dyer 192, a. ; Dyer, 87, pl. 101 ; Plow. 191 ; 1 H. Bl. 1 ; 2. H. Bl. 444 ; 1 T. R. 411 ; Willes, 296 ; 1 B. & P. 559 ; 7 Ea. 259 ; 2 Burr. 1019, 1089 ; 5 Taunt. 321 ; 8 Ea. 104, 91, 149 ; 9 Ea. 366 ; 2 Rep. 23 b. ; Amb. 375 ; 2 Roll. R., 277 ; 3 Co. 10 ;

Bridg. 101; 2 T. R. 656; 2 Atk. 451; 2 Burr. 912; Cro. Car. 493; 11 Ea. 246; 6 Cruise, 194, 231; Sug. Ven. 114; 1 P. W. 286; 2 P. W. 141, 456, 524; 1 Lord Ray. 728; Cowp. 94; 2 Bl. R. 930; 3 Bro. P. C. 375: 7 Bro. P. C. 353; 8 Ea. 91; 15 Ea. 310; 5 Taunt. 323; 6 Cruise, 231; 1 Ves. Sen. 255; Hob. 172-3; Cro. Car. 546; March 31.

Per Cur.—Postea to the plaintiff.

WADDEL V. M'CABE.

The words "value received" in an agreement to the following effect, "I promise pay to A B. or bearer 25*l.* value received, to be paid in merchantable wheat at market price," import a debt due, and are *prima facie* evidence of a consideration, and such an agreement may be shewn, under the counts for money had and received, and the account stated.

Assumpsit. The declaration contained nine special counts; to the first of which the evidence was inapplicable. The eighth stated, that in consideration that the defendant was found to be indebted to him in 25*l.*, upon the balance of an account then and there stated between them, the defendant, in consideration thereof, by a memorandum in writing, promised to pay the plaintiff two years from date 25*l.*, by delivering to the plaintiff or the bearer thereof so much good merchantable wheat at the market price at the end of the said two years as should amount to the sum of 25*l.*, averring a special request and refusal. The ninth count was, in consideration that the plaintiff had lent and advanced to the defendant 25*l.*, defendant, by memorandum in writing, agreed to pay plaintiff or bearer two years from date 25*l.*, by delivering to plaintiff or bearer so much good merchantable wheat, &c. There were also the common counts for work, goods sold, money lent, paid had and received, interest, &c., and a count on an account stated. Plea: The general issue. The following instrument was offered in evidence:—

"25*l.* Two years after date, I promise to pay to Thomas Waddel or bearer the sum of 25*l.* lawful money, value received, to be paid in good merchantable wheat, at the market price. (Signed) JOHN M'CABE."

Stoney Creek, January, 28, 1830."

At the trial the Chief Justice was of opinion, that this written instrument could not be given in evidence under any of the counts, and directed a verdict for defendant.

In Michaelmas Term last *O'Reilley* obtained a rule nisi for a new trial. *Sullivan* shewed cause.

ROBINSON, C. J.—In this case my learned brothers think that a new trial should be granted, upon the ground that the plaintiff was entitled to recover upon the eighth count in the declaration, and perhaps also upon the ninth count, and the count which lays an account stated in the usual form. I fully concur in that opinion. The insertion of the words, "value received," in the written undertaking, declared a previous debt to be due, and of course that previous debt forms *prima facie* a sufficient consideration to support the promise contained in the writing.

It was in this view, I think, the plaintiff desired to place the case at the trial, and I am of opinion that he was correct in doing so. The case at the last trial stood upon this footing; in the special counts, a consideration was alleged of a peculiar kind, but no proof of such consideration or of any other was offered. If the plaintiff had shewn such a consideration as is set up in these counts, the defendant might have objected that the alleged consideration was in reality of no value; and as the court would have presumed no other than that which the plaintiff advanced, the case must have stood or fallen upon the legal sufficiency of the consideration. But as the plaintiff proved no particular consideration, he of course waived all those special counts. The other counts, however, still remained; and I agree with my brothers, that they were, or some of them at least were, sufficiently supported, as to the consideration of the words, "for value received," contained in the instrument. That is, they were supported *prima facie*, and in the absence of any proof from the defendant that the consideration was in truth of no legal value. This of course was open to him to shew, as in cases of an action between the original parties to a promissory note; and it will be open to him to make that defence at the next trial, if the facts warrant it. He

offered no such evidence at the last trial, and the plaintiff should, therefore, I think, have been allowed to recover.

SHERWOOD, J. (after stating the case.)—I have considered the matter, and am of opinion the written instrument is evidence under the count for money had and received, and the count upon an account stated. When a sum of money is paid to a person, who in consideration of it makes a parol promise to the payee to do a particular thing on a certain day, and fails in the performance of this contract, an action of *indebitatus assumpsit* will lie for the money advanced. The payer of the money has a right, under such circumstances, to rescind the contract.—*I Esp. Rep.* 150; *4 Taunt.* 334. I understood the defendant in this case did not allege that he had ever delivered or offered to deliver to the plaintiff any part of the wheat mentioned in the agreement, but relied altogether upon the insufficiency of the evidence offered by the plaintiff; and therefore it appears to me, it must be presumed the wheat was not delivered, so far as that circumstance bears upon the present question, especially as the contract is in possession of the plaintiff, and the time for the delivery of the wheat had passed before the bringing of this action. Assuming, therefore, that the defendant wholly failed to deliver the wheat or any part of it, according to the terms of the contract, I have no doubt of the plaintiff's right to recover back the consideration he paid to the defendant, if he elect to pursue that course, and remain satisfied with that sum. In *5 Burr. 2011*, Lord Mansfield states the law upon the subject in this manner. “If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured, either to affirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use.” I will now state my view of the evidence given at the trial, as regards the two counts which I have already referred to. The writing on which this action is brought, is evidence under these counts, precisely like a pro*n*issory note when the action is brought by the payee against the maker. The same duty is raised,

and same privity exists between the parties in both instances. When a promissory note is given in evidence under these counts, it is adduced as a mere paper or writing, from which a presumption is drawn by the jury that the sum mentioned in it has been received by the maker from the payee, or that an account has been stated between them to that amount. When used in this way, it does not possess the privileges conferred upon it by the 3 & 4 Anne, c. 9, of being assignable, and carrying internal evidence of consideration ; but it has them, when specially declared upon under the statute. As evidence under the common counts, it stands precisely on the same footing as it did at common law before that act was passed.—Chit. on Bills, 367. In the case of Story v. Atkins, Str. 710, Lord Raymond said that the statute 4 Anne gave an additional remedy on promissory notes, but did not take away the old one, and that a promissory note may be given in evidence on an *indebitatus assumpsit*, as a writing to prove the defendant's receipt of so much money from the plaintiff. The same distinction is advanced in Hodges v. Stewart, Salk. 125, as respects a bill of exchange. The reporter says, "It was held that the plaintiff must bring a special action on the custom of merchants, or a general *indebitatus* against the drawer for money received to his use." In the case of Gibson et al. v. Minet et al., I H. Bl. 602, Eyer, C. B., said, "It has been expressly determined, that a general *indebitatus assumpsit* will not lie on the bill of exchange, but the *indebitatus* must be for some duty, such as money lent, &c., and the bill is offered as evidence of that duty. Now when it is offered as evidence of the duty, it is but evidence, and any of the presumptions which the writing affords may be contradicted by evidence, and from the whole of the evidence the jury must draw the conclusion of fact that so much money was lent, so much had and received, &c." The only difference between a promissory note expressed to be for value received, and the written contract in this case when adduced in evidence, is in form, not in substance : the latter contains the whole of the former, with the words "to be paid in good merchantable wheat, at the market price,"

which words have no allusion whatever to the amount of the consideration money received by the defendant, and are consequently immaterial in an action to recover it. They neither add to nor take away from the weight of testimony afforded by the proceeding words—"Two years after date, I promise to pay to Thomas Waddel, or bearer, the sum of twenty five pounds lawful money, *value received*,"—because the plaintiff does not seek to recover damages under the money counts for the non-delivery of the wheat, but merely the amount of the money advanced to the defendant. The question then is, whether the writing contains evidence of that fact. If it does, then it establishes a duty for which an action of debt or *indebitatus assumpsit* lies. Wherever the demand is for a sum certain, or is capable of being reduced to a certainty, debt will lie as on a contract to pay so much per load for wood, or for work done, or to pay a proportion of the costs of a suit expected to be incurred.—Com. Dig. Debt A. 8; Bull, N. P. 167; 3 Lev. 429. If the words in the beginning of this writing, which I have last mentioned, when found in a promissory note, would be *prima facie* evidence that the maker had received the amount of money mentioned in such note, I think there is no doubt the same words must have a similar effect in this case, unless it can be satisfactorily shewn that the words "to be paid in good merchantable wheat, at the market price," have a legal effect to render the meaning of words doubtful which of themselves are perfectly clear. It now remains to examine what evidence those words would afford in an action by the payee against the maker of a promissory note; and I think the analogy requires the like judgment in the one case as in the other. In Bishop v. Young, 2 B. & P. 82, the action was debt on a promissory note, by which the defendant promised to pay the plaintiff, or order, one month after date, 8*l.*, *value received*, in goods, debt was held to lie; and the reasons were that the note was drawn for value received, and the action was brought by the same person to whom it was given. Lord Eldon said, "This is a note; therefore, with a consideration apparent on the face of it;" the meaning of which remark I take to be, that the

note is evidence of the receipt of $8l.$, in goods, by the maker. Preddy et. al. v. Herbury, 1 B. & C. 674, was an action of debt by the drawer of a bill of exchange, against the acceptor, for $50l.$, payable two months after date to the plaintiffs, *value received, in goods*, and the action was sustained. Mr. Justice Bailey, who delivered the opinion of the court, says, at the close of his remarks, "Here there is an immediate privity between the plaintiff and defendant, independently of the bill. The defendant is immediate debtor to the plaintiff, and he contracts, by his acceptance, to pay that debt. Under these circumstances we think the action of debt maintainable. Had there been a want of immediate privity between the parties, or had the bill omitted to specify the consideration, the case might have been different: as it is we think the action maintainable." I think it evident from this case, that the court considered the words, "for value received" proved the acceptor to owe the drawer the amount mentioned in the bill, and that the law implied a promise to pay that sum.—5 B. & C. 360. In the case of Clayton v. Gosling, one question before the court was this—whether the words "for value received" in a promissory note, are evidence that the sum mentioned in the note was a debt due the payee by the maker at the time the note was drawn? The court decided they were "We have decided on more than one occasion," said Abbott, C. J., "that the expression, 'value received' in the note, imports 'received from the payee.'" The note in that case was signed by two persons, and was in the following words:—"On having twelve months' notice, we jointly and separately promise to pay Mr. John Clayton, or order, $200l.$, for value received, with legal interest." The Chief Justice further remarks: "The note in question may therefore be read thus—'We acknowledge to owe the payee $200l.$, and promise to pay him that sum with interest twelve months after date.'" Mr. Justice Bailey also said that the words "for value received" were an acknowledgment of a debt, and cited Highmore v. Primrose, as confirmatory of his opinion.—5 M. & S. 65; 1 Esp. 426. In the case of Fisher v. Leslie, a paper on which were inscribed

the several capital letters, "I O U," and signed by the defendant, was admitted to be read in evidence, by Eyre, C. J., as an acknowledgment by the defendant of having received from the plaintiff the sum of money marked on the same paper, being eight guineas. These letters of themselves expressed no such sentiment, but the natural inference to be drawn from them when connected with the payment of a specific sum of money was, that the subscriber owed the person who had the paper in his possession the amount of the sum mentioned, and therefore very properly cast the onus on the defendant of giving a more rational account of the transaction if he could. The words of the written instrument, in this case, are much more explicit, and more clearly prove a debt of 25*l.* to be due the plaintiff, who elects to rescind the special contract for failure on the part of the defendant to perform it; and, in my opinion, he can sustain this action on the counts alluded to, for the reasons I have given. I therefore think a new trial should be granted, without costs.

MACAULAY, J.—Confining my attention to the present declaration, and the instrument offered in support of the issue, and without expressing any opinion upon the legal effect of other stock notes drawn in terms different from the present, I am of opinion the writing produced ought to have been left to the jury as sufficient to go to them to establish the plaintiff's action under the eighth and the last counts, and perhaps the truth also, so far as it embraces a claim for money had and received. It is clear that at common law, promissory notes, made for the payment of money, and expressed to be for value received, or under the statute 3 & 4 Anne, c. 9, similar instruments, though wanting the words "value received," are evidence under the common counts for money lent, had and received, or upon an account stated; to which may be added the observation, that a promise to pay ordinarily imports a payment in money, as a promise to deliver goods, or to pay cash; also that "value received" imports value received by the maker from the payee, and so received in money if not otherwise expressed; at all events, received in some valuable consid-

eration, which (no question arising touching the amount) a jury, when left to conjecture, may infer to have been money either lent and advanced or had and received, or due upon the balance of an account, in the absence of any proof to the contrary. It is also said "*debt*" will lie for rent or other demand, when ascertained in amount, though made payable in goods, and on bills or notes expressed to be for *value received*.—5 B. & C. 501; 8 D. & R. 163; 3 D. & R. 165; 3 D. & R. 100; 3 Leon. 260; 4 Leon. 46; Dyer, 246; 1 Anderson, 117, 225; Cart. 165; Skin. 346; 1 Show. 5; 2 Vent. 307.

In applying the forgoing, it is to be remarked, that the question is, not in what form the plaintiff ought to have declared, but what evidence is sufficient to support the declaration as it is. Under either the general or special counts, he has two things to prove—1st, the consideration; 2nd, the promise. Under the former, when the consideration is proved, the promise results, or is presumed in law, under the common counts. Therefore, a promissory note is evidence of the consideration alleged. Under the special count, the plaintiff must prove the consideration alleged, and the special promise or undertaking averred. Under the eighth count, the consideration laid is an account stated; the special promise is to pay in wheat. Under the common counts, the consideration laid is money had and received on an account stated. Now, if in reading the present instrument, we stop at the words "*value received*," it contains all the terms and essentials of a promissory note for value. If so, it contains *prima facie* proof of that which such a rule would import. It is equivalent to an acknowledgment that the maker owed so much to the payee; and did it contain nothing more, a promise to pay in money would be implied. Then what follows is a mere qualification of the promise; it does not expand or restrict what goes before as respects the *consideration*; it merely restricts the legal inference of a resulting promise to pay in *money*. The first part of the writing, therefore, affords evidence of the consideration, and the latter part, of a special promise in favour of the maker, who could insist upon the acceptance of wheat if tendered

within the time, but subject to the liability of a money payment upon default. After default, the plaintiff could either proceed on unliquidated damages for the breach of contract, or he could treat the special contract as at an end, and sue for the consideration, as having been executed on his part. The instrument contains on the face of it evidence of the consideration, as laid in the present case. Had the terms of the writing been reversed, and the defendant for *value received in wheat*, promise to pay a sum of money, surely it would have afforded evidence to support a demand for the money as upon a promissory note, or upon an account stated, or for goods sold and delivered.—2 Esp. 639; 13 Ea. 105; 2 B. & P. 265. It would admit the consideration of goods sold as the value received, or it would import an account stated from the promise to pay, or in other words, from the acknowledgement of a specific sum due. When the value received is expressed, it is known by inspection; when not noticed, it is left to be inferred by the jury; and the presumption is, that it was money lent, had and received, or some debt due and owing, rather than, or quite as much as, any other subject matter. 5 T. R. 482. The case in 5 T. R. does not militate against this view. The question (in error) was, whether a written promise to pay a sum of money out of a particular fund, constituted a promissory note within the statute? It does not appear to have contained the words "value received;" and being a general judgment, and the first count bad on the face of it, the court could not have helped the case by applying the note as evidence to any of the common counts on the record. All the judges say (in determining it not to be a promissory note) is, that such undertakings should be sued upon as evidence of agreements, when the consideration should be stated and proved—a very just rule, when the instrument itself does not import or admit value, which was the case then. Lord Kenyon says, "If the promise were made on a consideration, no doubt an action could be sustained on it, as on a special agreement." I have no doubt but that an action might be framed on it, as on a special agreement. Per Ashburt, J.—Before the statute, promissory notes

could not be declared on as such, because the consideration did not appear on them. Though this might have been declared upon as a special agreement, stating the consideration for the promise, yet the action could not be maintained on it as a note. *Per Grose, J.*—The plaintiff could only declare on it as a note, or on the special contract between the parties. If he had declared on it as a special contract, he should have shewn that there was a consideration for the promise, &c., and the sufficiency of the fund designated be averred.

A promise to pay in money imports the admission of a consideration, or an evidence of an admitted balance or sum due; so a promise to pay a specific sum, to be paid in goods for value received, imports, by reason of the latter words, what a promise to pay in money imports, namely, value received in money lent, had and received, or upon an account stated. Had this been a sealed instrument, debt would lie for the money, even before the day, according to *1 Andr. 117*; but I doubt the authority to that extent.

Per Cur.—Rule for new trial absolute, without costs.

DOE EX DEM. DIXON V. GRANT ET AL.

Where there is an adverse possession of land, an heir-at-law, who has never entered, cannot make a conveyance, so as to enable his vendee to recover in ejectment.

Ejectment for lots D. E. and half of B. in the concession south of the middle branch Riviere aux Raisins, township of Cornwall. The lessor of the plaintiff claimed title under a deed of bargain and sale, executed in this province on the 7th November, 1823, by William Brown; which William Brown was proved to be the heir-at-law of the late Major William Hogan, to whom the lands in question were granted by patent, dated 26th March, 1798. The patent was produced. The death of Hogan, in Lower Canada, about the year 1805, and that William Brown was his heir-at-law, were proved. It appeared, in the course of the plaintiff's case, that Brown was an alien; and there was no evidence that he had ever been in Upper Canada, further than that, the deed to the lessor of the plaintiff purported to have been

executed in the province at the time of its date. A nonsuit was moved for, on the ground that no entry or possession taken by the heir previous to the conveyance had been shewn. The point was reserved, with leave to the defendant to enter a nonsuit, should it be held necessary. On the defence, it appeared that the defendants, McIntosh, McLellan, and one Drummond, severally took possession of separate portions of premises claimed between 35 and 40 years ago, or as some witnesses said, about the years 1796 or 1797, but under what authority did not appear. It was asserted they entered and held under Indian titles, but it was not shewn. There was not, however, any evidence of their holding as tenants, or otherwise as privies to the estate of Hogan. It also appeared that Hogan was in this province from 1790 till about 1798 or 1800, when he went to Lower Canada, where he died about the year 1805. He left a brother and two sisters, none of whom ever visited this province, or made an entry, or asserted any claim to the lands in controversy. They being all dead, William Brown, the son of one of the sisters, at the date of the plaintiff's deed, was the heir-at-law, but an alien, resident in the United States of America. It further appeared that Drummond died in possession, and that his two sons afterwards occupied his portion of the premises, but left them two or three years ago; after which Grant entered into possession, but it was not shewn that he entered and held under the heirs of Drummond. It was then submitted that an adverse possession for more than twenty years was shewn, and that the Statute of Limitations run against Hogan and his heirs, without interruption or suspension, having commenced while he was in the province, after the defendants had taken possession, and before he withdrew therefrom; or that, as respected the heir of Hogan, there was an abatement, after which, without entry or resort to an action for the recovery of possession, he could not convey, and consequently that the deed to the lessor of the plaintiff was inoperative. It was replied, that the Statute of Limitations did not run against the heir of Hogan, after his death, being out of the province; and that if otherwise,

such heirs had ten years within which to bring their actions, after the disability removed; and reckoning from November, 1823, the date of the plaintiff's deed, that period had not yet expired. It was answered, that the action is not brought by the heir, but his vendee, under a conveyance executed out of possession. It was further urged, as to Grant's one-third, that he not having entered under the heirs of Drummond, but apparently upon a vacant possession, the Statute of Limitations could not avail him. It was answered that if he entered before the deed to plaintiff, he was an abator of the estate of the heir of Hogan, who could not afterwards convey without acquiring possession previously; or that if he entered after the deed to the lessor of the plaintiff, not under the heirs of Drummond, this one-third, at the time of that conveyance, was circumstanced precisely as the other portions were; and that afterwards, when he entered, if wrongfully, he was the disseisor of the heirs of Drummond, and not of the lessor of the plaintiff, who never was seised under the deed from William Brown. The jury were recommended to find for the plaintiff—Macaulay, J., who tried the cause, remarking that if the alien acts cured the objection of foreign birth, and the entry of the heir under the facts in evidence was unnecessary, the plaintiff seemed entitled to recover. And the jury having found for the plaintiff, *Sullivan*, in Michaelmas term, obtained a rule nisi to enter a nonsuit on the point reserved, or for a new trial upon the facts disclosed on the defence. *Draper* shewed cause, and the following points were raised : 1st. Is all objection to the plaintiff's title, on the score of alienage, cured by the provincial statute on that subject? 2ndly. Did the Statute of Limitations commence running against Hogan, the ancestor, while in the province? and if so, was it suspended at his death in favour of his heirs, being resident abroad, or did it continue to run so as to bar their right of recovery in ejectment at the expiration of twenty years, without any right of protection under the proviso touching the removal of disabilities? 3rdly. If not adverse holders as against Hogan, the ancestor, did those in possession at his death afterwards hold adversely to the

heir-at-law, so as to constitute an abatement of his seisin? —and if so, could such heir convey before entry or recovery in ejectment? 4thly. If not, was an entry, as an abstract question nevertheless essential, to enable the heir to convey in the absence of any proof that a constructive entry was gained by the holding of the defendants as tenants, or as in possession for his benefit, or in any other manner? 5thly. Did the circumstances under which Grant entered, distinguish his case and the lessor of the plaintiff's right, as respects the one-third held by him, from the cases of the other defendants, and the remaining two-thirds possessed by them, as respects any of the foregoing points?

ROBINSON, C. J.—I am of opinion, and I believe my brothers concur with me, that there was an adverse possession for twenty years; for the statute having commenced to run (as it clearly did before he left the province in 1802, adverse possession having been taken some years before), it continued to run, notwithstanding the existence during the twenty years, of a disability in any one claiming under him; and the heir of Hogan is clearly disabled from now asserting his claims, after so long an adverse possession. It follows, that the verdict rendered for the plaintiff should be set aside, and a new trial granted, without costs.—4 T. R. 300; 6 Ea. 80; Plow. 374.

SHERWOOD, J.—Of the same opinion.

MACAULAY, J.—The provincial statute 2 Will. IV. c. 7, supersedes the first objection.

As to the second point, the cases shew that, admitting the patent gave the grantee seisin in law and in deed, yet that the defendants, living and continuing in actual possession, claiming independently of him, must after the long lapse of time that has intervened, be regarded as having held adversely, and consequently that the Statute of Limitations operates in their favour. Ejectment is a possessory action; and it does not seem there may not be an adverse holding possession, without a disseisin as a general proposition, whatever may be the case when the possession usurped is a freehold estate in fee simple.—1 Roscoe, 86-7; 1 Taunt. 598; Cro. Car. 304; 4 Taunt. 826; 4 T. R. 300;

6 Ea. 80; 7 Ea. 299; 6 Mon. 542; 2 B. & B. 217; 3 M. & S. 271; 10 Ea. 594; 2 D & R. 40; 5 B. & A. 690; 1 D. & R. 340. It is also clear that the Statute of Limitations having commenced running while the original grantee was in the province, it continued to run without interruption by reason of his subsequent absence, death, or the foreign residence of his heirs. 2 Preston's Abstr. 297, says, "While the heir has merely a seisin at law, and before that seisin is disturbed by *abatement*, the heir has a complete ownership for all the purposes of conveyance and dominion.—Peak. sen. 383.

Third and fourth.—However the heir-at-law may convey without making entry when the estate descended to him remains vacant, it seems clear that if a stranger enter previously, or (which is stronger) if a previous wrong possessor or disseiser continue to hold adversely, such possession constitutes an abatement in the former case, and continues the disseisin in the latter: and in such event, the heir having a right of entry only, cannot convey until he acquires possession. It is clear that the deed to the lessor of the plaintiff in this case is inoperative, by reason of the adverse possession of the defendants, which, at the time of its execution, was held as two-thirds by two of the defendants, and as to one-third by Drummond.—5 Bur. 2830; Plow. 88-142; 2 H. Bl. 444; Litt. S. 347; Co. Lit. 214 a.; 2 Com. 290; Co. Lit. 9 a.; 1 Bur. 113; 3 Bur. 1895.

Fifth.—Under such circumstances, as Grant holds also adversely, I do not conceive his having entered subsequently upon the retirement of Drummond's heir, helps the plaintiff's claim as to that part.—Hard. 400; Bull. N. P. 104; Doug. 494; Plow. 137; 1 Ea. 568; 1 Sal. 245; 1 Wil. 176; 9 Rep. 106; 5 Rep. 1236; 7 T. R. 390; Cro. Jac. 304, 604, 697; Cro. Car. 110, 400; 8 Ves. jr. 282; 8 Ea. 567; 2 B. & P. 541; 3 Comm. 175; 9 Ea. 17; 3 Mod. 297; Jenk. 227; 1 Sand. 319.

Per Cur.—Rule for new trial absolute, without costs.

DOE EX DEM. HUMBERSTONE V. THOMAS.

Semblé, that a devise of lands to the testator's wife for life, to be at her full and free disposal to whom and whensoever she pleases, and out of which the testator's just debts are to be paid, gives an estate in fee, and not for life, with a power of sale.

Ejectment for part of No. 27, 1st concession, Augusta. The lessor of the plaintiff claimed as heir-at-law of Samuel Hmberstone, deceased, whose seisin of the land in question was not disputed, and proved his heirship to the satisfaction of the jury. To this the defendant opposed—First, The will of Samuel Humberstone, dated 10th January, 1823, as follows:—"As for that worldly estate, wherewith it hath pleased God to bless me, I dispose thereof as follows: I give, devise and bequeath to Mr. Thomas Humberstone of York [the plaintiff's lessor], my potter's utensils, viz., a mill for grinding clay, one wheel for working, and one pestle and mortar. 2nd, I give and devise to my beloved wife, Mary Humberstone, the house and premises [now in controversy] that I now possess, and whereon I now reside; together with all and singular my other remaining property, both personal and real, to be hers during her natural life, to be at her full and free disposal to whom and whensoever she pleases; out of which it is my will that all my just debts shall be paid." Second, An indenture of bargain and sale, dated 14th April, 1823, after the death of testator, between Mary Humberstone of Augusta, widow and devisee of the late S. Humberstone, of Augusta aforesaid, deceased, of the one part, and Samuel P. Thomas, the defendant, of the other part; whereby, in consideration of 200*l.*, she granted, bargained, sold, &c., part of lot No. 27, 1st concession Augusta, particularly described; "subject to the reservations, limitations and conditions expressed in a deed from E. B. to the said Samuel Humberstone deceased of the same premises, bearing date the 9th of January, 1823;" and all the estate, right, title, &c., of her, the said Mary Humberstone, to hold to the defendant in fee simple, with absolute covenants that she was seised in fee, for quiet enjoyment and further assurance. Mary Humberstone died in 1828. The jury found for the defendant; and in Michaelmas Term last, *Bidwell* obtained a rule nisi to set

aside the verdict, upon the ground, that the deed under which the defendant holds is unauthorized by the will of the plaintiff's father. *Draper* shewed cause, and contented that the will imparted to the widow an estate in fee. For the plaintiff it was contended, that she took under it only a life estate; and that admitting it also gave a power to convey, still the deed in evidence will not operate as an execution of such a power. Being a power coupled with an interest, and the deed not professing to be an execution of the power, it will be regarded as intending merely to alienate her interest; and that on the face of the instruments, from the covenants, &c., it is manifest she claimed the fee, and desired to part with it as seised thereof.

ROBINSON, C. J., having been consulted on this title when at the bar, gave no opinion.

SHERWOOD, J. (after stating the case)—I have examined the will, and I think that there is no doubt that Samuel Humberstone devised to his wife either an estate in fee or an estate for life, with a power of disposing of the reversionary interest for the payment of his debts; and I am of opinion the deed executed by the widow, Mary Humberstone, to the defendants, will operate as a valid conveyance of the fee, if she had it, or as a legal execution of the power under the will, if it gave her one. This conveyance describes the widow as the devisee of the late Samuel Humberstone, and the land mentioned in the deed is admitted to be the same as that stated in the will; and therefore I think the conveyance by intendment of law might be taken to be a valid execution of the power under the will, if she had any, rather than the deed should be wholly inoperative. It is a settled principle in law, that a deed shall take effect, if possible, to the end for which it was intended by the parties; and while it does not appear that it was intended for any other purpose but to convey the land under the power, supposing there is one, it should enure for that purpose. *Nam ruba debent intelligi, cum effectu ut res magis valeat quam pereat.* I therefore do not consider it indispensably necessary to express an opinion in this case, whether the will gave the widow a fee or a life

estate, coupled with a power ; but yet it may be useful to examine the law on the subject, with a view of developing principles for future occasions, and I will for that reason state my present impression. (The learned judge here read the will as above.) My present opinion is, that the widow took an estate in fee in the lands devised by the will.

In the construction of a will, the first and great object is, to determine what is the intention of the testator ; and this must be done by a careful examination of the whole context of the instrument, to ascertain what end he really designed to accomplish, and what particular objects he had in view. It is frequently very difficult to discover the true intention of the testator, owing to contradictory and repugnant, as well as to vague and indefinite expressions in a will, and then the court must be guided by a sound discretion, and by the principles to be extracted from judicial decisions in cases analogous or nearly so. All the doubt in this case is occasioned by the words "during her natural life." The sentence in which these words are found is long, consisting of many parts, which are not connected together with any disjunctive or copulative word ; and the verb "to be," is placed immediately before and immediately after the words "during her natural life ;" and these words may be grammatically considered as adjuncts to the former or to the latter verb "to be," or may qualify either the former or the latter part of the sentence, as the general intention of the testator may best require. If these words are adjuncts to the former verb, the reading will be this—"to be hers during her natural life ;" if they are joined to the latter verb, the reading will be as follows—"during her natural life, to be at her full and free disposal to whom and whosoever she pleases ;" and as these words may be joined to either verb by the mere act of punctuation, and as they may read with either verb without any violation of the rules of syntax, there can be no good reason for not reading them in that way which the intention of the testator seems to point out as the more appropriate one. They ought not to be considered as restricting or qualifying the words "to be hers," unless it appears to be the intention of the testator

that they should have that effect ; because the intention of the testator should always govern and be followed, if it does not clash with the established rules of law.—2 Wel. 6-321; 10 Mod. 31; 11 Ea. 246; 3 Anstr. 783; 2 Salk. 234; 12 Ea. 215; Hob. 75; 8 Ea. 102; 1 B. & A. 136. To attain this desirable object, words in a will may be transposed or read in a different order from that in which they stand. In the case of *Roe, lessee of Shell, v. Patterson* —16 Ea. 221—Lord Ellenborough emphatically says, “Indeed there are no words of such an inflexible nature as will not bend to the intention of a testator, when it can be collected from the context of his will. Accordingly we have lately decided that the real estate passed under a devise of the personal estate, because it was clear that such was the intention of the testator.”—7 T. R. 209; Hoffr. 97. Expressions admitting of two interpretations, are to receive that one which will make them consistent with the other parts of the will. There is another rule of construction, which is worthy of notice. It is always intended that the devise is made for the benefit and advantage of the devisee, and should therefore receive as favourable an exposition as the rules of law will allow, whenever the subject matter is capable of two constructions. I will now give a short analysis of the will. The testator commences with these words :—“And as to that worldly estate with which it hath pleased God to bless me, I dispose thereof as follows.” He then gives his son a part of his personal property, and immediately afterwards devises his house and land, together with all his remaining property, both real and personal, to his wife, “to be hers during her natural life, to be at her full and free disposal to whom and whosoever she pleases,” and out of which he desires his debt to be paid ; and here it may proper to observe, that the testator makes no assignment over of his property to any other person after the decease of his wife. It has been long settled, that the word “estate” means the entire property and interest which any one is capable of holding ; and therefore when a testator expresses his intention to demise his whole estate, it is construed to mean all the interest he has.—5 Burr. 2639. Lord

Mansfield said in one case, "The word 'estate' carries everything, unless tied down by particular expressions." Mr. J. Buller said, in another case—*1 T. R. 414*—"The word 'estate' is the most general that can be used. So far from its being necessary to add words of inheritance, in order to make it pass a fee, words of restraint must be added to make it carry a less estate; for it is *genus generalissimum*." It appears to me, the words of the will clearly establish the three following propositions. 1st—The testator fully intended to dispose of his whole estate. 2nd—He intended to provide a fund for the support of his widow. 3rd—He intended that all his debts should be paid out of the widow's share. These, I think, were the principal ends for which he made his will; and I will now endeavour to ascertain whether they would be accomplished if the widow only took a life estate, with a power to dispose of the fee for the payment of debts. I will suppose a surplus would remain upon the sale of the lands, beyond the amount of the debt, and I will also suppose such surplus would belong to the heir at law, and not to the widow. In such a case, it is self-evident the intention of the testator, as respects the support of his widow, would be wholly defeated; instead of receiving a support, she would be left in poverty. Such a devise would be a mere matter of form and of no kind of advantage to the widow; and I think it would be an injustice to the memory of the testator to suppose he ever intended to make such a disposition of his property, as regards his widow. On the other hand, I will suppose the will gives a life estate and a beneficial interest, without limitation in the surplus money after satisfaction of the debts, to the widow; this would be substantially a devise of the inheritance, subject to the payment of the testator's debt, and would, in effect, accord with his intention in making his will. The widow, to all intents and purposes, would have the fee, subject to the payment of debts. The intention of the testator would be fully accomplished. His whole estate would be disposed of, his widow would be provided for, his debts would be paid. This latter construction, in my opinion, would produce the effect

designed by the testator—that is to say, to give the whole estate and interest to the widow, subject to the payment of debts; but I am fully persuaded he never intended to attain this end by such means. It is not at all probable he had any idea of such an intricate and complicated procedure, even if he could have legally adopted it; and therefore I am inclined to think he did not do it, and particularly as he might have effected the same purpose by a plain, simple and ordinary method—that is, by devising the fee. I cannot think the testator devised a life estate, with a bare power to convey for the payment of debts, leaving the surplus to the heir, because such a devise would clearly defeat his own intention. I cannot think he devised a life estate with power to sell for the satisfaction of debts, together with a life estate in the surplus of the money produced by the sale, because in such case I think the widow could only appropriate the interest of the surplus for her support, which might be a mere pittance altogether inadequate to the purpose. The surplus itself, in my opinion would belong to the heir after the death of the widow, and she would hold it in trust for him under such a devise. Viewing the devise, therefore, in every aspect, I think the testator undoubtedly intended to give the widow an estate in fee. I am consequently of the opinion that the words, "during her natural life," were meant to be joined to the subsequent part of the sentence in which they stand, and in that place they are not merely expletives, but serve to shew more clearly that the remaining words would of themselves do, that the widow was not obliged to sell the land within any particular period, but that the time of sale was left with herself. I think by a slight transposition of these words, in the following manner, the intention of the testator will be expressed with perfect precision—"I give and devise to Mary Humberstone the house and premises that I now possess, and wherein I now reside, together with all and singular my other remaining property, *to be hers, to be at her full and free disposal during her natural life, to whom and whosoever she pleases; out of which it is my will that all my just debts be paid.*" According to this arrangement,

she would clearly take an estate in fee, and this transposition accords with the evident intention of the testator, and is warranted by the authorities already cited.—2 Bl. C. 1041; 8 T. R. 1; 4 Ea. 496; 2 Atk. 341; 3 T. R. 356; 3 Ans. 1783,

MACAULAY, J.—In disposing of the first point—that is, whether the devise imparted a fee simple to the widow—it is not to be overlooked that the will is introduced in these terms—"As for that worldly *estate*, &c., I dispose *thereof*," &c.—Cow. 352; and in ambiguous cases such introduction may be properly adverted to in aid of the construction. Looking at the whole will, it may reasonably be inferred the testator did not mean to die intestate, but to dispose by will of his whole estate, real and personal, the widow being the principal object of his bounty, giving in the same clauses certain freehold estate and all other property, real and personal, not previously bequeathed, to the lessor of the plaintiff. Upon considering the case, I am disposed to think that the effect of the devise to her is, to give a life estate, with power to dispose of the fee.

A general devise, without words of limitation, and nothing from which to infer a design to impart a fee, is a life estate only.—Cowp. 355. The cases shew that a devise "freely to be enjoyed"—6 Cruise, 326: or "to give and sell and do therewith at pleasure"—1 Inst. 96; or "to dispose and employ the same on the devise (a wife) and the testator's son, at her will and pleasure"—Bro. Ab. Dev. Pl. 39; Moo. 57; Owen, 32; or "to the devise for her own use, to give away at her death to whom she pleases"—1 Leon. 156; 3 Leon. 115: or to give and dispose thereof at his pleasure"—8 Vin. Abr. 36: or "to dispose thereof at pleasure"—2 Preston on Estates, 74: or "to dispose at will and pleasure," "or to dispose for the payment of debts"—1 Chann. on Powers, 40, et seq.: and the like, have been held to pass estates in fee simple, but by *implication*, let it be observed, when a life estate is expressly limited, followed by a disposing clause similar to the above, the authorities seem to establish that a life interest accrues to the devisee, to which is superadded a power to dispose of

the fee simple. (The learned Judge then entered into a review of the following cases:—3 Leon. 71; 4 Leon. 41; 1 Leon. 283; Noy. 80; Latch. 9-39; Latch. 134; 1 Jones, 137; W. Ben. 7-178; 2 Wils. 6; 1 P. Wms. 149; Sal. 239; Comym. 193; 10 Ves. 370, 10 Ea. 437; 1 Mod. 189; 3 Lev. 104; 1 Freem. 149, 163, 176; Cart. 232; 2 Ves. 589; 7 Ves. 398; 13 Ves. 445; 2 Preston on Estates, 80 *et seq.*; Cow. 299; Doug. 321; 6 T. R. 30; 1 Inst. 36; 1 Lev. 183.)

Applying these cases to the present, it appears to me that under the present devise, the widow would have taken a fee simple under the words "to be at her full and free disposal to whom and whosoever she pleases," had they not been preceded by the express limitation "to be hers during her natural life;" which latter gives a property for life, with a power of disposing of the absolute estate. It remains to be seen whether the additional clause, "out of which it is my will that all my just debts should be paid," makes any difference.

It will be found that, as in the instance already mentioned, a charge upon the devisee to pay debts or legacies, or a direction for their being paid out of the estate devised, gives a fee by implication—constitutes in construction a fee, when otherwise a life estate only would have subsisted. I have found no case in which a devise to a person expressly for life, followed by a charge upon him or upon the estate in his hands, for the payment of debts, legacies and annuities, has been held to enlarge the life interest into a fee.

A devise generally, on condition of paying a sum of money or debts, gives a fee by implication, on the principle that a devise of land shall in all cases be intended for the benefit of the devisee, which might not be the case if burthened with a payment that might exceed the life estate in value. The distinction lies between a burthen charged upon the rents and profits, or upon the land or the devisee; and it seems the rule is the same, whether the devisee be charged, or the payment be directed to be made out of the estate devised.—1 Inst. 96; Cowp. 841; Cro. El. 204; 3 Rep. 202; 6 Rep. 16; 3 Keb. 49; 11 Mod. 208; 2 Vern.

687; 2 Show. 33; 3 T. R. 356; 3 Burr. 1533; Burr. 1615; 5 T. R. 558; 8 T. R. 1; Cowp. 355; 4 Ea. 499; 5 Ea. 93; 9 Ea. 7; 2 B & P. 253; 15 Ea 394.

The case of *Doe ex dem. Burdett v. Wright*, seems to settle clearly, that an express devise for life, with pecuniary charges, is not enlarged into an estate in fee. Bailey, J., says, "I find no case where, after such an express devise, it has been held that a charge of this sort will extend the estate to an estate in fee." Holroyd, J., says, "I am of opinion that the codicils are not sufficient to raise by implication the express estate for life given by the will, into an estate in fee." It would seem, therefore, that without the words "to be at her full and free disposal to whom and whosoever she pleases," the subsequent passage touching debts would not of itself enlarge the estate into a fee; and we have seen that these words amount only to a power of sale; consequently that the charge for the payment of debts has not the operation contended for. There is, besides, this reason against the implication contented for, that the devisee has a clear power of sale, which power might be exerted for the purpose of raising funds to defray debts; wherefore the necessity and reason for taking a fee absolutely by reason of such charge, seems obviated.—2 B. & A. 710. Having a power of sale supperadded to the life estate, she has an adequate means for raising funds as if the fee simple had been vested in her by implication; and when a will is sufficiently clear and explicit in itself, the door would appear closed against construction or implied enlargement of its terms. I am therefore of opinion she took an estate (charged with the payment of debts) for life, by express limitation, with a power of sale over the fee simple.

The next question is, whether by the deed to the defendant, such power has been effectually exercised, and I think it has. The cases seem to establish, that a power or authority is not considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual, or would have had nothing to operate upon, except it were

considered as an execution of such power or authority.—
10 Moo. 113; 2 Bing. 49; 6 Bing. 475; 6 Rep. 17; Cro. El. 877; Cro. Jac. 31; Hob. 160; 10 Co. 143; 1 Atk. 441. 559. *Standen v. Standen* (2 Vez. jr. 589) is the strongest, perhaps, in favor of the execution, to be met with; and though not apparently approved in some cases, it was affirmed in the House of Lords. The language of the Lord Chancellor is strong and emphatic, and tends to hold, that without referring to the power, it was well executed, the wife having no other real estate—an extraneous fact which it is said in some cases the courts will examine into under powers touching real though not personal estate; the one (in case of powers created by will) being such property as the party had at the time, the other including such as he held at his death.—7 Ves. jr. 399. In another case, the Master of the rolls said he agreed with the last case, but dissented from the argument of Lord Rosslyn; that the decision was right upon the argument of Counsel, upon the special ground that the will was attested by three witnesses, with reference to the power of disposing of the estate. “Upon that argument the decision is perfectly right, for it is evident the testator is applying her will to the subject of her power; and if I find that she is speaking of the subject of her power, an express reference to the power is not necessary.” It is clear that an instrument professing to be in execution of a power, where there is also an interest, will, if inoperative as such execution of the power, operate upon the interest, when containing words applicable and sufficient for such purpose; and it would seem that if a party execute an instrument with a view to operate upon a supposed interest, such instrument will, if no such interest existed, but a power only, enure as an execution of a power if otherwise sufficient, unless restrained by unequivocal express declaration indicating a contrary intention.—
13 Vez. jr. 453; 10 Co. 144; 12 Mod. 469; 2 Bro. C. C. 300; 3 Ves. jr. 299; 4 Ves. jr. 60; 7 Ves. jr. 395; 13 Ves. jr. 450; 2 H. Bl. 138; 1 Atk. 560; Arcbl. 740; Hob. 140; 2 Bing. 497; 10 Moore. 113; 5 B. & C. 720; 8 D. & R. 514; 6 Bing. 475; 1 Lev. 151; 2 Lev. 151; Jon. 327; 2

T. R. 252; 1 Y. & J. 445; 6 Ea. 289; Cow. 600; 15 Ves. jr. 580; 8 Vez. jr. 616.

It is always a question of intention, whether the party meant to execute the power or not. Formerly it was sometimes required there should be an express reference to the power; but now, the intention may be collected from other circumstances—as, that the will includes something the party had not, otherwise than under the power; that a part of the will would be wholly inoperative, unless applied to the power, &c.—3 Abs. 259. Mr. Preston says a deed of bargain and sale is the more usual form of exercising an authority, for the reasons he assigns. Many of the cases, indeed all in which the want of a reference to the property has been excepted, arose under wills couched in general terms. Those cases do not apply to deeds *inter vivos*, in which the property is fully described. The difficulty in acts *inter vivos* has its origin in Clerc's case, in which the distinction between a nude authority and a power coupled with an interest, is recognized. Now, the case before us is distinguishable from most which I have seen, in which the effect of the conveyance has been questioned on the ground of there being a power coupled with an interest—in this, that here the interest is partial and the power general; the interest is partial as to the quantity of the estate, and the power general; the former being a life estate, and the latter extending to the fee simple. In Clerc's case, the party had some estate in point of interest and quantity, upon which the instrument could operate to the full extent, though he did not enjoy such an interest in all the property he professed to dispose of. His act could operate in point of interest and quantity of estate, as fully as was designed; but it could not so operate upon the whole, but a part only of the property specified. If, therefore, the deed to the defendant was not held to enure as an execution of the power, the defendant could only take a life interest in any part of the land, though the object was clearly to convey a fee in the whole. He could not, as an interest of the widow, take a fee in any part. To hold it not an execution of the power, would therefore on this principle be to declare

it void as to the main object of the parties. When the object, as in this case, is clearly to pass more than the interest—namely, the whole estate—the courts seem disposed to recognize the conveyance as a good execution of the power, though the party might have supposed she possessed an interest as large as that expressed. It cannot be said she did not intend to exercise the power. The covenant of seisin in fee affords argument that she thought she held the fee; but the effect of its introduction is contracted by other considerations, such as its being questionable whether she had the fee or not, and the clear power at all events to dispose of it for the payment of debts, if not for her own use. In addition to which, I think the instrument does refer to the power with sufficient precision to obviate all difficulty. The donor of the power under the will is in the deed described as the widow and devisee of the testator. It cannot be said this does not refer to the will, which will constitutes the power. Again, at the end of the description, the land is declared to be conveyed, subject to the reservations, limitations and conditions expressed in a deed from E. B. to the testator, of the same premises, dated the 9th January then last. Upon the ground, therefore, that it is an act *inter vivos*, that the deed expressly mentions the property and refers to the power, and that the object and intention was to dispose of the fee simple, and not a less estate or interest, without confining the operation to the interest of the widow, whatever it might be, to the exclusion of any presumed intention to execute a power if possessed beyond the interest, I am of opinion that (regarding the will as clothing her with an interest for life and a power to dispose of the fee) the deed to the defendant may be properly construed and regarded as imparting the fee simple in execution of the power. If she took a fee simple under the will, of course the deed is sufficient; so that either way, in my view of the subject, the defendant has a good title.

Per Cur.—Rule discharged.

CLARK AND STREET V. BONNYCASTLE.

In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises, as for instance, what is to be considered the bank of a river, other grants from the Crown are admissible in evidence to assist the construction, and grants from the Crown either for a valuable consideration, or of special favour, are to be construed in the same manner as deeds from subject to subject.

Trespass quare clausum fregit. Declaration : 1st count states, that the defendant, on the 15th June, 1833, and on divers other days, &c broke and entered a close of the plaintiff, being the broken lot No. 145 in the township of Stamford, which said close is butted and bounded as follows :—Commencing at the south west angle of broken lot No. 145 ; then north 20 chains, more or less, to the north west angle of the said lot ; then east 23 chains, more or less, to within one chain of Niagara river ; then southerly along the bank of the said river, always at the distance of one chain from the top thereof, 20 chains, more or less, to the south east angle of the said lot ; then west, along the southern boundary of the said lot, to the place of beginning. 2nd count similar to the first, omitting the special description. 3rd count : General *quare clausum fregit*.

Pleas : 1st. Not guilty. 2nd. As to first count, soil and freehold in the king, by whose command the defendant entered, &c. 3rd. As to third count, soil and freehold in the king, by whose command the defendant entered.

Replication to 1st plea, *similiter* ; to 2nd, that the *locus in quo* is the soil and freehold of the plaintiffs, and not of the king ; to 3rd, new assignment, that the *locus in quo* is butted and bounded as follows, viz. : beginning at a point where the lots No. 145, 146, and 159, are nearly in contact ; then west, along the northern boundary of the whole lot No. 159, 50 chains ; then south, along the western boundary of the said lot, 20 chains ; then east, to within 51 chains of Niagara river, 13 chains, more or less ; then southerly, parallel to the shore of the river, 10 chains, more or less, to the centre of lot No. 160 ; then east, to within one chain of the river, 50 chains ; then northerly along the bank, always at the distance of one chain from the top of the bank, to the centre of lot No. 145 ; then west, up the centre of lot No.

145 23 chains; then south 10 chains, to the place of beginning; and is different from the close in the third plea mentioned. Plea to the new assignment, not guilty.

It was admitted on the trial of this cause, that the trespass was committed by the defendant by the command of the king, upon a certain tract of land on the top of the high bank near the falls of Niagara, in the township of Stamford, in the possession of the plaintiffs, under one William Forsyth, and which tract the plaintiffs contended composed a portion of the south half of the broken lot No. 145, and not a part of a reserve of one chain, which on the defence it was contended had been reserved along the front of the said lot No. 145, on the top of such high bank: in other words, it was asserted on the plaintiffs' part, that the reserve of one chain was on the top of the table rock, along the lands whose base was washed by the waters of the river; while it was insisted upon on the defence, that such reserve was along the top of the high bank, although its base was not immediately washed by the waters, the latter bank constituting, topographically speaking, the bank of the river Niagara.

The plaintiffs produced—1st. A patent, under which they claimed title to Francis Elsworth, dated 14th February, 1798, for lots No. 150, with the broken front between it and the Niagara river; the north half of the broken front east of No. 160, and the north-east part of No. 160, and the south half of the broken lot No. 145; two hundred acres, more or less, in the township of Stamford, butted and bounded as follows—"beginning at the south-east angle of lot No. 156, at a point and part where the lots Nos. 145, 146 and 159 are nearly in contact," (and following the courses set out in the new assignment to the third plea), *habendum*, to Francis Elsworth, his heirs and assigns forever.

2nd. A patent, dated 19th April, 1798, to Timothy Skinner, for part of lots, Nos. 160, 173, 174, 175, & 176—three hundred and ninety acres—with an allowance for roads, beginning at the limit between lots Nos. 175 & 190, within one chain of Niagara river, then west eighty-nine chains, then north sixty-one chains, then east to within

fifty-one chains of Niagara river, then southerly parallel to the river to the centre of lot No. 160, then east to within one chain of Niagara river, then southerly (always at the distance of one chain from the river) to the place of beginning.

3rd. A patent, dated 31st December, 1798: To James Forsyth three hundred and eight acres, with allowance for roads; being lots Nos. 143, 144 & 146, and the north half of 145; beginning at a post one chain from the top of the bank of Niagara river, in the limits between Nos. 209 & 144; then west to within one chain of lot No. 142, ninety-nine chains, more or less; then south forty chains; then east fifty chains; then north ten chains; then east to within one chain of the top of the bank of Niagara river; then northerly along the top of the bank (at the distance always of one chain from the edge thereof with the stream), to the place of beginning.

4th. A license of occupation, under the sign manual of the Lieutenant-Governor, dated 9th May, 1804, to Isaac Savage, for part of the land reserved for military purposes; commencing at the north-east angle of the land occupied by M. and J. Burch; then north forty-two degree west one chain, to the Niagara river; then down the stream, along the bank of the river to a small cedar tree standing about two chains to the southward of the table rock; then west one chain; then southerly, parallel to water mark, at the distance of one chain, until it meets the lands occupied by Timothy Skinner and the said M. & J. Burch, being the place of beginning; five acres, more or less, with a small island in the front of the lands described, containing seven acres.

5th. A patent, to Thomas Clark, for fourteen and a half acres, dated January, 1816; being a chain of land, extending from the military reserve at Chippawa, down to the boundary of a lease granted to Isaac Swayze; commencing on the river Niagara, at the southerly angle of the military reserve, on the west side of the Chippawa; then along the western boundary line of the said reserve, south twenty-two degrees west one chain; then (always at the distance

of one chain from the Niagara river) various courses and distances northerly and westerly, &c. &c., to the eastern boundary of Isaac Swayze's lease; then along said boundary line one chain, to the Niagara river; then along the water's edge, following the several windings and turnings thereof against the stream, to the place of beginning.

The plaintiffs next called Charles K. Fell, a deputy surveyor.—He proved that he had recently surveyed No. 145, and also the whole tract of land that had been granted to Elsworth; that, measuring from within one chain of the lower bank of the river, in the centre of No. 145, up to the base line, he found the distance to be twenty-four chains seventy-seven links—from within one chain of the precipice to the top of the upper bank, ten chains seven links—from within one chain of the top of the upper bank to the base line, thirteen chains seventy links: that if one chain from the top of the precipice or lower bank is the correct boundary, then there is a difference between the distance in the patent and the distance from that boundary, of one chain seventy-seven links: that if one chain from the upper bank is the correct boundary, then there is a difference of nine chains thirty links: that he commenced at a stone boundary, sworn to by Mr. Row, at the north-east angle of No. 218, in Stamford: that the base line from that point was from east to west; thence he proceeded along the front of two lots, to a point sworn to by Mr. Oldfield, on the base line (finding marked trees along the line); he then continued the line from that point to Lundy's Lane; again he ran, commencing at the rear of No. 160, at the south-west angle of No. 159, then east to within fifty-one chains of the Niagara river, thirteen chains; then southerly, parallel with the river, ten chains, more or less, to the centre of No. 160; then east fifty chains, to within one chain of the Niagara river, the last distance being fifty chains, with the exception of a small fraction: that there is a difference in the distance from the upper bank and the lower bank, in the last line, of five chains fifteen links: that the contents of the south half of No. 145, extending the boundary to one chain from the bank of the river, is twenty-three acres and a rood; the

contents of the same lot, extending only to one chain from the upper bank, is eleven acres three roods; the contents of the whole lot 145, if bounded by the lower bank, would be fifty-two acres, including the reserved chain; if bounded by the upper bank, it would not contain thirty acres: that he thought, by running the courses in the government deed bounding the Elsworth land, he would include the *locus in quo*; he could not run a distance of one chain from the upper bank without deviating from the courses of the government deed: the contents of the whole tract, taking the lower bank as the boundary, and excluding one chain from such bank, are two hundred and twenty-three acres; taking the upper bank as a boundary, and excluding the one chain from such bank, the contents are one hundred and eighty-two acres three roods: that he knows of no lot along the river, which is a numbered lot, containing less than fifty acres; if the upper bank is the boundary, No. 145 would not contain so much as the broken front of No. 159, which was never a numbered lot: he found the actual contents of the land granted to Timothy Skinner, to be four hundred and fifty-eight acres; the government deed said to be three hundred and ninety acres; he found the actual contents of the land granted to Forsyth, to be three hundred and twenty-one acres; in the government deed they are stated to contain three hundred and eight acres. Cross-examined: The lower bank of the river above the Falls is not high; there is a weir or dam above the Falls, which has a tendency to throw the water from the lower bank of the river towards the centre of the stream; there is an upper and lower bank to the river along the three different tracts; the lower bank is very low at the table rock; it is much higher below the Falls, and somewhat higher above them than at the table rock; above the Falls, the lower and higher banks approach very near each other, still witness thinks there are two banks both above and below the Falls.

George Rykert was next called.—He is a surveyor; he accompanied the last witness to make his survey: they commenced in the limit between Nos. 175 & 190, on the bank of the Niagara river; then west to the rear of the

broken lot 175: found a birch tree marked, and a small stake within a few feet, to the south—[Oldfield and Row were sworn; the former stated he knew this boundary thirty-five years; Row said he had known it thirty years as a boundary]—they then proceeded to a stone boundary, said to be at the north-east corner of No. 218; the same persons found this boundary, and said they had known it for the same time respectively; they then ascertained the course between these boundaries to be north one and a quarter degrees east, and the distance between them to be forty chains fifty-eight links: they found a number of marked trees, which Oldfield said were governing points on that line: they then continued to the centre of the broken front of No. 160, the same course; there they found a division fence; then east to the river thirteen chains, to high water mark, including the reserved chain; they then went to the rear of the broken front aforesaid, and ran north one and a quarter degrees east ten chains, to the limit of the broken front between Nos. 159 & 160; then east to the river fourteen chains, including the reserved chain, to high water mark; then returned to the rear of the same broken front; then continued north one and a quarter degrees east thirty chains seventy-eight links, to the centre of No. 145: at this point they found that the public highway from the north would not exactly meet the one from the south; the distance from the rear of the lot to the road from the north, would be four chains seventy-eight links. They then run from the centre of No. 145 east to the river bank twenty-five chains seventy-five links, including the reserved chain: the distance from the same place on the same course to the high bank, is fifteen chains thirty-four links, including the reserved chain; difference in the two distances fifteen chains forty-one links: on the limit between Nos. 159 & 160, the distance to the upper bank is six chains seventy links; and thence to high water mark is seven chains thirty links; down the centre of No. 160 to the upper bank is six chains eighty-five links, and thence to high water mark five chains fifteen links. On No. 145, the slope of the upper bank is an inclined plane of between

thirty-four and thirty-five degrees ; the lower bank is perpendicular : the upper bank is altogether lost or gradually disappears a few lots before that lot ; afterwards there is but one bank. If the witness followed the course and the bank of the river, as stated in the patent to Elsworth, he could not produce a line along the upper bank ; such a line would be different from the deed. The south half of the broken lot 145 contains twenty-three acres, if extended from the lower bank ; and if extended to one chain from the upper bank ; it contains about thirteen acres. Cross-examined : Has been a surveyor about eleven years ; did not ask Mr. Clark where the boundaries were or had been ; asked Oldfield and Row if they knew of any other boundaries, and they said they did not ; witness never heard any one assert that there were any other boundaries known.

Joseph Oldfield : Has resided upwards of forty years on lot No. 195, in Stamford ; he accompanied Fell on his survey, and pointed out the stone boundary ; witness has known that boundary for thirty-six years ; there is a boundary at Lundy's Lane, and he knows of no other between that and the birch tree ; the distance between them is about a mile : he has always seen the line exactly as it now is, and is the same he traced with Fell : has known loads of stone drawn from about twenty yards of the table rock to where Harvey's mill is : it was generally understood the reserved chain extended from the water's edge. Cross-examined : From the birch tree to Lundy's Lane, there are several crop farms : he recollects that Mr. Burwell surveyed some part of the distance from a birch tree to Lundy's Lane : he knows that a dam above the Falls throws the water off to the centre of the stream ; and if the dam was not there, the water would flow higher up on the land : when the wind is from the land, the water rises higher up ; he thinks it would come near to the distance of one chain from the highest bank, more or less, but cannot say ; thinks it would not come so far in any other place : there are some trees which have been cut down between the stone boundary and the birch tree : the narrowest place near the lower bank is on the Skinner tract, above the Elsworth tract ; there is no

place near so narrow on the latter tract. Hon. W. Dickson once owned the Elsworth tract: for forty years never heard that the government claimed a chain from the upper bank; it is but lately the claim was made; he never would have bought the tract of land, if he had any idea that government owned a chain from the upper bank: there is but one bank opposite to the south part of the Skinner tract, as the witness thinks: he always thought that the chain was reserved one chain from the river, to allow persons going up the river in boats to land without being trespassers. Cross-examined: The expression "military reserve" does not mean an exclusive privilege for the military forces, as the witness thinks.

George Rykert recalled.—Between the bottom of the upper bank and the high water mark, all along the whole width of the Elsworth tract, would be two and a half chains at the narrowest point: he thinks there is at least the distance of a chain between high water mark and the water along the river opposite this tract: what he means by high water mark, is the point to which the water of the river extends at the highest water: it comes to that point only once in several years: at other times it is below it.

John Radenhurst: Is in the office of the Surveyor-General; has examined the original map of Stamford, called the Quebec map: he thinks there is nothing on the map to shew any bank of the river at all: he searched in the office, and could find nothing to shew for what purpose a chain along the river had been reserved: he found, however, that there was a reserve of a chain in width, but he could not find from what bank it was reserved.

(*Note.*—The Attorney-General, who led for the defendant, admitted this last evidence to be given.)

John J. Lafferty: Has known this part of country since the year 1797; he always understood that the chain was reserved from the first bank: there was a still-house built under the upper bank, and stood there for thirty years, and he never heard any objection; it was built on the Elsworth tract, and there is a house standing there now; it is about two and a half chains from the first bank, near the river,

and between that and the upper bank; the still house, however, is not now standing: knows that stone was drawn before the dam was built above the Falls; there was sufficient width for a road then at all times: the land under the upper bank, and between that and the lower, was considered as a part of the Elsworth tract, to within one chain of the lower bank.

On the defence it was objected, that the patents or government descriptions for adjacent lots, issued subsequently to Elsworth's, could not be read in evidence against the crown as admissions, or explanatory of the precise meaning of the earliest patent, in the terms adopted to designate the boundaries; which Sherwood, J., overruled. There was then offered—1st. An exemplification, dated 26th January, 1828, of a judgment, upon an information of intrusion—*Rex v. William Forsyth*—for intruding upon ten acres of pasture land, ten acres of arable land, ten acres of meadow and ten acres of wood land, in Stamford, tried before Mr. Justice Macaulay, at the Niagara assizes, in the year 1827, when a verdict was rendered for the king, and judgment entered accordingly. 2nd. A memorial, dated 11th February, 1833, from one of the defendants and two other persons, to his Excellency the Lieutenant-Governor, setting forth, that, with others, they had in April then last, purchased from William Forsyth the farms at the Falls of Niagara, with all his right, title, claim and interest in and about that place, which had been long held by him without making improvements, or affording proper accommodation or comfort to the numerous visitors who annually resort to that place; that they had laid out these farms into lots, for the purpose of building a town or city, and were also preparing to make roads, erect baths and reading-rooms, with other improvements, &c.; that besides the chain width which is already reserved along the bank of the river, the company intended to reserve a very considerable space in addition, &c.; that to accommodate the town or city with building, &c., and make the proper walks and approaches to the Falls, the reserve in front of lots Nos. 145 & 160 was most necessary, &c.: wherefore they solicited

such a grant or devise of the land in front of the three lots as to his Excellency might seem meet, upon the express conditions that they shall observe all the orders of the Governor in Council in respect of highways through the tract, and in respect of reserving free access to the public in every manner that might be thought reasonable ; and also upon the condition, that the government might at any time resume the occupation of any part of it that might be thought necessary for military purposes. 3rd. A letter, of same date, from same persons, transmitting such memorial to his Excellency the Lieutenant-Governor, which concludes as follows :—“ We also, in case the prayer of the memorialists is granted, enclose his Excellency’s former license to William Forsyth to improve part of the grounds asked for, to be given up.” 4th. A letter, dated 20th December, 1833, from Col. Rowan, communicating his Excellency’s answer, that he would grant the company a license to occupy such part of the government reserve at the Falls of Niagara, as might be required to complete their interior improvement ; but that he certainly would not consent that the public should be shut out from the approach to the road leading to the Falls, the table rock, or any of the places then open to the public ; and that he thought it right they should understand that although he was desirous of giving every possible encouragement to the proprietors of the new city, yet, that he was no less bound to prevent the government reservation from being transferred to a company that might at some future period be able to establish an exclusive right to the reservation. 5th. A letter of explanation, dated 16th April, 1833, from the signers of the memorial to the Lieutenant-Governor’s secretary, urging the issue of the license promised.

Mahlon Burwell, a surveyor.—At the time of the assizes in 1828, witness went with Augustus Jones to survey the Elsworth tract ; went to the stone boundary and to the birch tree mentioned before, and took the bearing between those boundaries. On producing that line further north, it did not correspond with the fences of the inhabitants. Afterwards he went to the southern boundary of the tract,

as he was informed by Mr. Jones, and produced a line, according to Jones' original memorandum, intersecting the top of the highest bank. Mr. Jones took him to the place of beginning, mentioned in the patent to Elsworth, and he produced a line thence to the top of the highest bank, and the distance was twenty-five chains, including the allowance of one chain on the top of the bank. On the northern boundry he produced a line to the top of the bank, and found a distance of twenty-three chains fifty links. He found the distance from a fence between lots 159 & 160, to be fifty-nine chains fourteen links; thinks that distance includes an allowance of one chain; that fence was eleven chains fifty-two links from the west ends of lots 159 & 160. He found the south boundary of the Elsworth land, and the distance was forty-eight chains fifty links to the top of the bank. He made the lands described in the patent two hundred and twenty-two and eight-tenths acres. The reservation in front of the land on the top of the bank, contains five acres and eight-tenths. He thinks a line produced from the birch tree to Lundy's Lane, on the same course as that from the stone boundary to the birch tree, would go too far to the right; thinks such a line would not be correct. From the description in the patent to Elsworth, he thinks the top of the highest bank is the one mentioned in the patent: he thinks, indeed, there is but one bank, and there is a slope from the top of that bank to the water's edge. He considers all the land from the top of the bank to the river, as belonging to the crown. He never went under the bank towards the river at all. To form a correct opinion of the description in the deed, the whole must be taken together; and he thinks it absurd to suppose there is more than one bank, although it may be several chains from the river.

James G. Chewett.—Is a surveyor; has computed the quantity of land in the grant to Elsworth, and finds there are two hundred acres, as near as possible, extending the lands to the top of the bank. In the Surveyor-General's office, it has always been considered there was but one bank to the river in front of these premises; witness thinks

there is but one band—that is, the highest ground near the river, as described in the plan exhibited. He thinks the surveyors Fell and Rykert were incorrect in the mode they adopted to ascertain the line in rear of the broken front, as stated by them; the original boundaries were placed in rear of the lots, excluding the road. To ascertain the boundaries in rear of lots, the witness would have found the side lines of the lots, and not attempted to trace the line in rear of the broken front; he does not know that any line was ever run in the rear. In traversing one of the side lines, he found the present concession road in No. 127 as near as possible where he thought it should be. He thinks the reserve of a chain, called the military reserve, keeps at the top of the highest land all along the premises granted to Elsworth, and above and never below them. He never surveyed the whole, nor calculated the whole quantity; but he has made a calculation of the quantity in the broken front, though he never surveyed it. He thinks that part of the boundaries in Elsworth's deed which continues the side line within one chain of the river, is restrained by the subsequent part of the description, which requires the line extending northerly down the river to continue on the top of the bank.

Augustus Jones.—Has been a surveyor since 1787; proves a report of a survey made some years since, together with a plan; he sent them to the office of the Surveyor-General, as his report of a survey. [The chain-bearers were sworn.] He surveyed the township of Stamford, in front, in the year 1787 or '8, except a small part near the Chippawa; he numbered the lots all along the front, as they are in the plan. He knows what is now called the Elsworth tract; he made a general survey of that, as he did of the other lands; he reported his survey to the Surveyor-General, generally. It was recommended by the commandant at Niagara, and by the Land Board, that one chain should be reserved for public purposes, along the front of the township of Stamford and other townships on the Niagara river. The reserve was to be from the top of the high bank in this township; in some other townships

the reserve was from high water mark. He intended, when he surveyed this township, to leave the one chain reserved on the top of the highest bank. He planted a post, or marked a tree, to shew the limit of each lot at the east angle, the whole width of the township in front of the highest bank. When Mr. Burwell went with him to survey the Elsworth tract, he pointed out all the boundaries of the tract, as he had them in his memory; the lines were produced from those boundaries; there were no posts ever planted at the centre of lots, but only at the east angle of each lot. The line from the stone boundary to the birch tree, as mentioned by the other surveyors, was run out by him, and is the true course of the base line as he originally run it out in 1787 or '8. He went last Monday, and measured the distance from the base line from No. 145, down the centre of it, from the top of the highest bank, and he found the distance to be thirteen chains seventy links, including the allowance for the reserve of one chain. He thinks he found the true base in rear; at least he was not thirty links out of the way, according to his opinion. In the original survey, when the broken front or front of any lot was supposed to be less than fifty acres, it formed a part of the lot; but when it amounted to or was over fifty acres, it was numbered as a lot. If the course and distances in the government deed to Elsworth are followed and adhered to, the south boundary would extend to within one chain of the Niagara river. He thinks his reserve, which he made originally, is actually included in the government deed to Elsworth; and that the Surveyor-General, in making out the description in the deed, destroyed the reserve of a chain at the top of the bank which the witness left in 1787 or '8, as before stated. He thinks he reported to Mr. Smith, the Surveyor-General, in 1792, that there was a reserve of one chain along the top of the bank of the Niagara river, in the township of Stamford and the adjoining townships; he is not quite sure whether the report which he made was verbal or written; he thinks he must have stated it in some way at the time to the Surveyor-General. On the north boundry of the Forsyth tract, he extended the line to the perpendicular bank of the river; that tract adjoins the Elsworth tract to the north.

John Silverthorn.—Has resided in Stamford since 1787 ; knows the Elsworth tract very well ; saw a stake on the top of the bank in that year —, which he was informed was planted there to shew the reserve of a road ; he heard that Jones planted it there ; it stood on the Elsworth tract. The land below the high bank and the water, was swampy and wet ; it was a cedar swamp. When the wind was from the west and high, the water rose very much in the river ; thinks a road could not well be made in front of the Elsworth tract ; it would take a great deal of work to make a road under the high bank. He always thought the reserve of a chain was at the top of the high bank. Cross-examined.—The first time he saw the stake, he was near the line fence, between the Forsyth and the Elsworth tracts ; the stake was near the fence, and about one chain from the top of the high bank. There was a still-house under the high bank in front of the Elsworth tract, twenty or thirty years ago ; it belonged to one Bugner, who told witness he got the land it stood upon from Elsworth.

Lanty Shannon.—Witness has resided more than thirty years in Stamford : is well acquainted with the Elsworth tract ; never heard of any reservation on the top of the bank till four or five years ago ; he heard a good while ago that there was a reserve along the river generally. The land in front of the Elsworth tract, near the table rock, is very swampy, wet land. Cross-examined.—The still-house of Bugner, he thought, was on the Elsworth tract ; and he expected that when he thought of buying it from Elsworth, he should own it quite down to the river.

Captain Phillipotts, R. E.—In 1827, Jones pointed out to witness the reserve of one chain along the top of the upper bank, according to his report filed in court. He thinks the high bank in front of the Elsworth tract, is a continuation of the bank of the river at Chippawa ; he thinks there is but one bank ; he has no doubt in his own mind that the reserve was never intended to be under the high bank, but on the top of it. Cross-examined.—In 1827, the fence in the Elsworth tract, then belonging to Forsyth, extended quite to the river Niagara. He thinks there are two banks

below the table rock at the Falls ; but above the Falls, as he thinks, there is but one bank.

SHERWOOD, J., who tried the cause at the last Niagara assizes, told the jury that the only question for them to determine was, whether the *locus in quo* was embraced within the boundaries specified in the government deed to Francis Elsworth.

The jury found for the plaintiffs, and 5*l.* damages.

The *Attorney-General* obtained a rule nisi to set aside the verdict, in Michaelmas term last, on the following grounds : —1st. The admission of improper evidence ; the patents for lands other than the *locus in quo*, having been received in evidence as explanatory of the patent alleged by the plaintiffs to have granted the *locus in quo*. 2nd. The verdict being against evidence ; the survey on which the plaintiffs obtained their verdict being illegal, and founded on the protraction of a line which was not originally run, and contrary to the original survey of the *locus in quo*, and the modern surveys in evidence, founded on that original survey ; and also as placing the military reserve the *locus in quo* beneath the bank of the Niagara river, and not within one chain from the top of the bank in the plan marked out in the original survey made by Agustus Jones, the person making such original survey. 3rd. The verdict being contrary to the judge's charge ; or why the verdict should not be set aside and a new trial granted on payment of costs, on the ground of surprise ; the survey on which the plaintiffs rested their case being on a principle different from any former survey, and the defendant not having any opportunity, for want of notice, of such new survey, to counteract or deny in evidence the correctness of such survey, by any survey made on behalf of the defendant. And it was argued in Hilary term, by *Draper* for the plaintiffs, and the *Attorney-General* and *Sullivan* for the defendant.

ROBINSON, C. J., having conducted a cause wherein the same question was raised and disputed, gave no opinion,

SHERWOOD, J.—With respect to the first objection, the admission of illegal evidence, the plaintiff's counsel, in his opening at the trial, alleged that a reserve of one chain in

width of the land, adjoining the Niagara River, along the whole front of the township of Stamford, had been made by the crown, and that the origin of the dispute between the present litigants, was a difference of opinion respecting the locality of the eastern boundary of such part of that reserve as was situate in front of the Elsworth tract. The plaintiffs contended the reserve should be measured from high water mark; the defendants insisted it should begin on the top of the bank. After reading the description in the patent to Elsworth, my opinion was, that the reserve commenced at the top of the bank of the river, and not at high water mark, although I at the same time admitted that the description involved a doubt; but then the plaintiffs advanced evidence to establish the existence of two banks, called the high and the lower bank, and the defendants brought testimony to prove that there was but one bank. The testimony, therefore, before the jury was conflicting. Supposing the jury might find that the reserve began at the top of the bank, and not at high water mark, then they must determine whether there was more than one bank; if they found two banks, then they must decide from which the reserve was to be measured. It is quite clear, I think, that this kind of testimony, creates a latent ambiguity in the description contained in the patent, so far as regards the existence of two banks; and I thought documentary evidence as well as parol might be received, for the purpose of removing the doubt. The documentary evidence objected to, consisted of two patents from the crown—the one to Timothy Skinner, of lands adjoining to the Elsworth premises, and situate on the river next above them; the other to James Forsyth, of lands adjoining the same premises, and lying on the river next below them. It was submitted by both parties, that the reserve was general, and extended the whole width of the township in front; and as the entire township originally belonged to the crown, it struck me that the description contained in the king's patent to any other grantee, in which the same general reserve was mentioned, might be read as evidence explanatory of the original distance or proximity of the reserve to the river.

This might afford presumptive evidence either for the plaintiffs or the defendants, according to the ordinary distance of the reserve from the river in other places, and according to the ultimate view which the jury might take of the result of the whole evidence to prove there were two banks in front of the Elsworth tract. Upon this principle the deeds were allowed to be read, and I cannot distinguish it from the principle found in several cases.—¹ M. & S. 292; 14 Ea. 338. I still incline to think the evidence was admissible, and was properly received when tendered at nisi prius. Whether the evidence was of any use to the party producing it, is not the present enquiry, and cannot in the least degree affect the legal principle. I am aware of the maxim, that *res inter alios acta alteri nocere non debet*; but I think this case does not substantially touch upon that rule, because the pleadings for the defence shew the crown to be the real though not the nominal defendant, and the patents to Skinner and Forsyth prove them to be the grantees of the crown, precisely as Elsworth is. I am therefore of opinion that the peculiar facts and circumstances of this case take it out of the general rule just stated, and that the first objection is not sustainable.

I now come to the second objection, "that the verdict is contrary to evidence," and I will freely admit I have found much difficulty in forming an opinion on this part of the argument in support of the application for a new trial; not from any difficulty in point of law, but from a doubt of the real intent and meaning of a part of the description in the Elsworth grant. For the removing of this doubt, it will be necessary to examine the rule of construction applicable to grants from the crown; which appears to be, that grants from and to the crown must in general be construed most favourable for the king.—² Roll. 219; 2 Co. 24; 5 Co. 56; Plow. 243. But there are several exceptions to this rule. One of these is, that the construction shall be in favour of the grantee, when the grant is made for a valuable consideration, or when it is made *ex speciali gratia certa scientia et mero motu regis.*—¹ Co. 40; 10 Co. 112; 2 Inst. 466; 6 Co. 56 a.; 10 Co. 65; Plow. 337; 3 Leon. 249. The

grant to Elsworth is of this latter description; and the rule of construction applicable to this class, I take to be the same in substance with regard to grants by indenture from one subject to another, in which the intention of the parties is the true criterion.—*9 Co. 131 a.; 10 Co. 67 B.; Com. Dig.; Grant. 12: Bac. Ab. 604.*

I am therefore of opinion, that the intention of the crown, as it may fairly be deduced from the words of the grant, must prevail. The Elsworth tract is composed of Lot No. 159, with the broken front between it and the Niagara river—[Ante page 529.] The point of commencement in this description is in the interior, the length of one lot from the Niagara river; and the part of the southern limit which extends fifty-one chains, and is protracted in a due east course, is the only one which intersects the bank of the river; and consequently this limit, together with the eastern limit in front, extending northerly the whole width of the tract, are all that are necessary to be considered or to be remarked upon. I observe the expressions "shore" and "bank" are both made use of in the description, in allusion to the land contiguous to the river; and although these words sometimes convey ideas somewhat different from each other, still, when they are used as descriptive of that part of the land which is in a state of junction, or nearly so, with the waters of a river, I think they are always intended to express precisely the same idea. In my opinion, therefore, they are used synonymously in this description, which has already proved a prolific source of litigation, and which threatens the parties interested with a further continuation of trouble. The words are the following:—"Then east to within one chain of the said river; then northerly along the bank, always at the distance of one chain from the top of the bank, to the centre of lot No. 145." There is no doubt that the former part of this sentence, namely, "then east to within one chain of the said river," admits of two constructions. It may mean that the southern boundary may extend within one chain of the water; or it may mean that the southern boundary should extend within one chain of the edge of the bank, according

to the sense in which the words are used, and the manner they are qualified by the preceding or subsequent parts of the context, or both. The latter part of the sentence, namely, "then northerly along the bank, always at the distance of one chain from the top of the bank," can admit of but one meaning, namely, that the eastern boundary must extend along the summit of the bank, and at the distance of one chain from the top. The question then is, did the crown intend to grant the land to within one chain of the edge of the water, or to within one chain of the edge of the bank? If we say the king intended to grant the soil to within one chain of the edge of the water, we must wholly reject the words "along the bank always at the distance of one chain from the top of the bank;" because the words are evidently incompatible with an intention of granting the land within one chain of the water—the bank at this point being elevated, and the summit of it being several chains from the water's edge. On the other hand, if we say the intention of the crown was to grant the land to within one chain of the edge of the bank, we must necessarily construe the words "to within one chain of the said river" to mean "to within one chain of the bank." I must say, however, that if these words, "to within one chain of the river," stood in the description unaccompanied by the subsequent words, the most natural and obvious meaning of these words would be, that the southern boundary went to within one chain of the water's edge. This was one of the principal points upon which the arguments of the plaintiffs turned: and their council at the trial urged to the jury with great ability, that such was the construction which law and justice demanded in this case. If it were satisfactorily proved that there were two banks, then the fact of the southern boundary extending to within one chain of the edge of the water, would afford strong ground for arguing that the eastern limit in front proceeded along the bank nearest the water, and consequently would tend to prove that the *locus in quo* was not within the limits of the government reserve. Critically speaking, the word "river," signifies the stream of water which flows along the base of

a bank; but experience teaches us that the word "river" is frequently used to signify the river's *bank*, and not the water itself. Words are correctly and often used in common parlance to express something more than their literal terms naturally suggest. Queenston is properly said to be seated on the Niagara river, and Sandwich on the Detroit river; and yet nobody ever supposed they were not on the bank of the river. A traveller might truly allege he had proceeded to the Ottawa river, when in fact he had gone no further than the top of its bank. This mode of expression rhetoricians term a figure or trope, and it seems at first view to imply a deviation from what is common and natural; but this is far from being the case, for on many occasions it is the most natural and common method of uttering our sentiments: it is indeed impossible to write or speak many sentences of any length, without the use of tropes; and consequently the most illiterate persons speak in that way, as often as the most learned; and the only difference between them is, that the illiterate man habitually uses figures and never knows it. Figures abound in all languages, which proves that they are the language of nature, and in common use. Cicero, in his third book, *de oratore*, says, "Modus transferendi verba late patet quam necessitas primum genuit coacta inopia et angustiis, post autem delectatio jucunditas que celebravit." Upon the whole, I am of opinion that the words, "to within one chain of the river," may be correctly considered to mean "to within one chain of the bank of the river," without violating in the least degree the established uses of our language, if the succeeding words, "along the bank, always at the distance of one chain from the top of the bank," demonstrate that the preceding ones were intended to be used in the sense to which I have just now alluded, and I think they do. If the former words were not so used, the latter would be wholly useless and unmeaning; and I cannot think they were introduced into the grant as mere surplusage. It must be admitted, however, that this part of the description is not well drawn. It wants perspicuity and precision, to a degree which rarely occurs in the description of premises

conveyed by grants from the crown. It is evident the writer of the description was ignorant of the particular locality of the premises he attempted to describe. He undoubtedly supposed the bank of the Niagara river at that point rose precipitously from the edge of the water, which is not the fact. But, on the other hand, it is equally evident from the words he uses, that he intended to describe the southern boundary as terminating at the distance of one chain from the top of the bank; he knew the distance which the eastern limit should pass from the top of the bank, but he did not know the distance from that limit to the edge of the water.

Presuming that those words were inserted for a useful purpose, I can discover no other than the restriction of the southern boundary of the Elsworth tract to the distance of one chain from the top of the bank, and therefore I conclude they were intended to do so. It is very evident, however, that the description in the grant is ambiguous, and that the ambiguity is occasioned by the doubt, whether the word "river" is used in a literal or metaphorical sense; and it will be well to examine how a doubtfulness of meaning of this kind can legally be removed. The means to be employed must depend upon the nature of the ambiguity. An ambiguity apparent on the face of a deed, is technically called *ambiguitas patens*—that which arises merely upon the application of a deed to its supposed object, *ambiguitas latens*. The former is always found in the deed itself, but the latter only occurs when the words of the deed are certain, and free from doubt; but parol evidence of extrinsic or collateral matter produces the ambiguity—as, if the deed is a conveyance of *Blackacre*, and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. Parol testimony, therefore, in such a case, is admissible, in order to explain the intention of the grantor, and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself. This is *ambiguitas patens*. Now,

I think the ambiguity to which I have just alluded, is of that description, and that parol evidence ought not to be received to explain it, although both parol and documentary evidence were allowed to be used at the time for that purpose.—4 B. & A. 57. I now think, however, that I was mistaken in that particular in my impression *at nisi prius*. Having, therefore, made up my opinion from the words of the grant, that the crown intended to convey the land to within one chain of the edge of the bank, and not of the water, it only remains to examine whether there is any rule of law to prevent its adoption. I have already said I think the grant from the crown to Elsworth should be construed precisely like a deed by indenture between two private individuals, and that the rule of law in such a case is, “the intention of the parties must prevail, if the deed be not void in law.” In the celebrated judgment of Willes, C. J., in the case of Parkhurst v. Smith—Willes, 348—that learned judge observed, “It is a known maxim of law, that ‘benigne facienda sunt interpretationes chartarum ut res magis valeat quam pereat.’ There is another that, ‘verba intentioni et non econtra debent inservire.’ It is said in our books, that the construction of deeds ought to be favourable, and as near to the apparent intention of the parties as possibly may be, and the law will permit: that too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the intention of the parties from taking effect: for the law is not nice in grants, and therefore it doth often transpose words, contrary to their order, to bring them to the intent of the parties.” He further observed, he had collected those rules from Littleton, Coke, Plowen, Hobert and Finch. It is also a rule in law, that the construction be made upon the entire deed, and not upon disjointed parts of it, “nam ex antecedentibus et consequentibus fit optima interpretatio;” and that theretore every part of the deed, if possible, be made to take effect; and that every word may operate in some shape or other.—Bulst. 101; P. Wm. 457; 2 Atk. 89; 3 T. R. 470; 1 Bur. 282. I am not aware that any of these rules have ceased to be law, and therefore I conclude the intention of the

crown, as deduced from a reasonable construction of the entire grant, must prevail; and my opinion of what that intention is, has already been stated with respect to the southern boundary. Concluding, then, that the Elsworth tract extends to within one chain of the top of the bank, but no further, another question presents itself, which undoubtedly gives a real case of *ambiguitas latens*. I allude to the allegation of their being two banks in front of the *locus in quo*. This is undoubtedly an extrinsic matter, first disclosed by parol testimony, and consequently subject to be removed by the same description of evidence. I incline to think, from the verdict of the jury, that they must have concluded there were two banks along the whole part of the front of the Elsworth tract; but my present impression is, that they were not warranted in that conclusion—at least, it is very doubtful. The evidence, however, was imperfect, and did not delineate the topography of the land adjacent to the water either below the Falls or at any other point, with that accuracy and discrimination which the nature of the case rendered both desirable and necessary; and the jury, after all, may have remained doubtful whether there were one or two banks which might answer the description in the grant. The idea of two banks is naturally suggested by the sudden and striking difference in the altitude of the river Niagara, and the marked disimilarity in the appearance of its western bank within a short space along its extent above and below the Falls. The river opposite the Elsworth tract forms itself into a vast and irresistible torrent, rushes down a perpendicular descent of one hundred and fifty feet, and excavates a deep and serpentine channel through a mountainous mass of rock of several miles in extent. The cause of the sudden change in the appearance of the bank arises in a great degree from the following circumstances:—Above the Falls the bank is composed of a loamy soil, ascending somewhat gradually from the river, and covered the whole distance to its summit with trees and underwood; below the Falls the bank is very lofty and precipitous, and composed altogether of rock, destitute of soil, whose craggy protuberances, impending over the water, form a strong and

rude contrast to the bank above the cataract. The different character of the landscape, therefore, above and below the Falls, as viewed from the river, would lead to the supposition that one bank was not a continuation of the other. Another reason for imagining there are two banks is, that the high land which forms the part of the bank above the cataract, in its extension towards the north, leaves a low swampy flat between its foot and the edge of the water, and, receding gradually from the river, imperceptibly blends itself with the undulating face of the country, till it wholly disappears. With respect to the fact of there being a flat or level space from the foot of the bank to the water, it can form no argument, in my opinion, to sustain the proposition that there are two banks, because such kind of flats are often found at the foot of the banks of all rivers. They are seen along the several windings and turnings of the stream, and extend in width in proportion to the varied accessions of the bank. Such a flat at the foot of a high bank, it seems to me, can never be correctly termed the river's bank, although it unquestionably forms a part of it. It also appears to me a matter of no moment, how far the elevated land stretches to the north, below the Falls. The flat opposite the *locus in quo*, and at the foot of the bank above the Falls, was proved to be connected with that bank by a slope, whose inclined plane forms an angle of about thirty-five degrees with the plane of the horizon. Now I believe that there is no doubt that the summit of the bank below the Falls is more elevated than this flat; and I am inclined to believe the bank below is united with that above the Falls, by a natural acclivity much less steep than the slope just mentioned, and therefore should be considered, I think, a continuation of the bank which we see above the Falls, rather than a separate one.

The last objection to the verdict is, "for being against the judge's charge." I certainly expressed an opinion to the jury in favour of the defendant, upon the whole case, but with great doubt upon the question whether there was one or two banks. Since that time I have considered the subject with much more attention than the hurry of a trial

could possibly admit, and I have formed the opinion already expressed. There must be a new trial ; and I will take this opportunity to suggest the propriety of having a view, which appears to me grantable as a matter of course in an action like this. The jury will then be able to examine the matter with more correctness and facility, and nothing will be wanting to afford them all the information which the nature of the case will permit, and the interest of both parties undoubtedly require. If another jury, after taking a careful and correct view of the whole premises, shall find a verdict for the plaintiffs, it will of course remove many doubts which now exist.

MACAULAY, J., (after stating the case).—It may be proper to notice, that Stamford was laid out from north to south, and that the lots are numbered throughout the township, and not by concessions merely. The *locus in quo* is in the vicinity of the Falls of Niagara, and this case depends upon the construction of the patent to Elsworth—that is to say, upon the question, whether the south-eastern limit of that grant is one chain from the top of the high bank, or from the bank of the river, or the land immediately confining the channel. The waters are participated over a flat rock, called the table rock, in front of lot No. 159 ; the front of lot 160 being above, and that of No. 145 below the Falls. For some distance above the Falls, the river consists of a turbulent rapid, sweeping swiftly along the margin of a tract of low land, the level of which rises only a little above that of the water line, and diminishes toward the cataract, so as to terminate in almost a perfect flat at the verge of the cauldron. Owing to the Falls, the bed of the river sinks abruptly upwards of a hundred feet, into a chasm divided on the Canada side by the overhanging projection called table rock. Immediately receding from this table, the land is for some distance flat and swampy, and forms the base of a high bank, that rises from the Chippawa river, and winds irregularly down the line of the stream, passing very near the water's edge some distance above the falls—the front boundary being obviously one chain from the top of the bank—one chain retired from the top of such bank, and

not one chain below it, or on its face in advance nearer the river; from thence retiring from and approaching the river in its curvatures, leaving at some places flats of material width, and at others little space between it and the water.

This bank eventually leaves the river some distance below the falls, and tends into the interior. From the mouth of the Niagara upwards, and especially from Queenstown, the river is embraced by high precipitous banks, with more or less flats at intervals. The Chippawa or Welland intersects the Niagara river higher up than the rapids above the falls; and in descending from the confluence along the top of the bank, one would, opposite the falls upon lot No. 159, find himself on the interior or high bank. In ascending from the mountain at Queenstown along the top of the bank, he would, on reaching the falls, find himself at the table rock, below the high bank last mentioned. If the grant to Elsworth contains any patent ambiguity, the term bank should in construction control the word river. The grant specifies certain lots by numbers, and sets out metes and bounds which, on the face of the deed, seem well calculated to embrace the tract designated. It is however conceived, that when the precise nature of the ground is ascertained, it becomes a question, what is the bank of the river therein mentioned, and meant to be referred to—a question susceptible of explanation by extraneous testimony. When it is shewn that a line run northerly from within one chain of the water's edge of the river in front of lot No. 160, would pass along the table rock, and not along the high bank behind it—and that there is not only such high bank, but that the nature of the flats skirting the river may admit of its margin being also termed a bank—it becomes uncertain what is meant by the expression "the bank" in the description of the land. Admitting that this property forms a latent ambiguity, it is to be considered whether it is satisfactorily removed, or whether a new trial should be granted, in order to submit the case to another jury. In opposition to the application to set aside the verdict, it has been forcibly urged, that there being evidence on both sides and such evidence having left the question of boundary

doubtful and uncertain in point of fact, it constituted the proper province of the jury to determine on the whole of the testimony on both sides: and that under such circumstances the court should not, consistently with the principle governing the exercise of the discretion vested in them, disturb the finding. This argument is supported by many other weighty considerations. The cases and discussions that have arisen in this court, cannot fail to have shewn that the reserve contemplated along the Niagara river was one chain from the water on the edge or top of the bank, rising abruptly from the shore; and it is in evidence that the reservation in front of the lots adjoining on the north or below the one in dispute was so made, and that the lots adjoining the Elsworth tract on the south or immediately above it, apparently descend below the bank contended for by the defence as bounding the front of the latter, and advance to within one chain of the river. From the course of survey already mentioned, the lines of the lots granted to James Forsyth must have been run out before those of Elsworth; and if the north or lower half of lot No. 145 is (as seems clearly in proof) bounded by the precipitous bank, its northerly angle having been ascertained by the stake planted to mark the limit between it and the easterly angle of No. 144; it may well be asked with what consistency the south or upper half the said lot should be limited by a different bank restraining its comparative length towards the river. It is, however, possible, considering that no continuous chain was ever marked off; but that the reserve was left step by step in laying out the lots along the river—a course of proceeding admitting of such deviations or offsets, if on the ground thought expedient. The principal point, however, is *the bank*, meant to bound the north half of No. 160 where a like incongruity occurs. If the high bank bounds the north half of No. 160, it may be asked how the south half of the lot can descend below it, to within one chain of the river, so that the exterior halves on each side north and south of the Elsworth tract must project a difference of several chains eastward of or nearer the river than the exterior halves or portions of those lots included in the Elsworth

patent? Further, admitting that the said *bank* may control the word *river*, if plainly so intended, it may be said that if *doubtful*, the *river* is a more definite and unequivocal rule than *bank*, and should govern, and that if not so, the nature of the ground admits and answers both terms, as used in the Elsworth patent, by adopting the river bank, or the edge of the flat, or the margin of the land confining the water, the *bank* named therein, in favour of which construction and application Swayze's lease is quoted, as containing that term unequivocally applied to the rim of the flat land at the water's side, at the foot of the high bank and along the front of the Elsworth grant.

It may also be urged, that however the original survey terminated on top of the high bank, the government grant might expand and has extended the lots to within one chain of the river, the latter being the only quantity meant to be reserved—a fact evinced by the reservations below and above, as on reference being had to Swayze's lease, and to Forsyth's, and Mr. Clark's grant of 1816, will appear; also that the patents subsequent to Elsworth's are admissible as evidence of the original survey or general intention, and that in point of fact it was proved that they accorded with such survey and intention. But in the latter point of view, we are again led to the original survey, which ought to govern: *Reddendo singula singulis.* Bank may in one case mean *one boundary*, and in another case *point to a different call*.

It is submitted also, that one chain from the precipice was obviously reserved from Queenston upwards, and that if followed continuously it would pass on the table rock under the high bank, and not ascend it till much higher up the river. On the other hand, a person passing up from Queenston *under* the bank, would at the falls have to ascend to the table rock, and thence trace his way along the margin of the river, and upon the tract which the plaintiffs now contend is the top, and not the foot of the bank. Then on the defendant's side it is to be further observed, that as a known rule, applied to matters of this kind, “*id certum est quod certum reddi potest*,” and that “*veritas nominis*

tollit errorem demonstrationis," that if lands are in the first instance described by their proper or principal name, an error in any addition or explanation made to their names or descriptions will have no prejudicial effect. In reference to government grants, the lands in this province are laid out in townships, concessions and lots ; the latter of which are numbered or lettered, and so designated in the public archives of the colony. It is obvious Stamford was so divided and subdivided ; and it is manifest that the patents or government grants are generally predicated upon, and are supposed to follow and conform to a previous actual survey. In the present instance it is evident, that the principal part of the tract granted being specified lots or defined portions of lots, data were at once afforded for ascertaining the property embraced, and a subsequent description was mere surplusage as respected those portions of the premises, and it would have been altogether useless, were it not that the portion or extent of Lot No. 160, meant to be included, can only be ascertained by the aid of such boundaries. They were not requisite to point out the limit of Lot No. 145, but were requisite to shew the limit of Lot No. 160. The description, therefore, if inaccurate, would not, I apprehend, control the previous sufficient description by numbered lots, which lots the first words of the description assume to have been previously so designated, and to have been marked by a surveyor's monument. As respects No. 160, the description is not material in order to identify the portion of that lot, after it directs the course to be run, which is to terminate at the front limit. But admitting that the description is to be adhered to, and that it may control by enlarging or restricting the limits of the other lots mentioned, I cannot say the verdict is satisfactory. If an ambiguity is raised, the best evidence must be resorted to for its solution, and in this case I consider the most satisfactory evidence to be the testimony of the surveyor who originally laid out the township, under the orders of the government, in 1787 or 1788, and who expressly said, that a reserve of one chain had been made along the whole line of the Niagara River, and that he left such reserve on the top of

the high bank along the township of Stamford, and that he had on the front of the premises in question left such reserve on the top of the highest bank, and not on the table rock or flat below ; adding, that in surveying this point of the river, he never went down below to what is called the table rock. In his evidence he also said, that he planted posts to mark the easterly angle of the lots laid out by him. If the original survey does, in cases falling within the provincial statute 59 Geo. III. c. 14, control the description in the patent, it seems certainly the best evidence of its purport and meaning when involved in doubt and ambiguity.

The other patents, though of subsequent date to Elsworth's, have been hitherto received in evidence against the King in trial, touching the same question now again agitated ; and without saying that, as emanating from the crown, they are not admissible as against the crown with a view to assist the interpretation of the term bank, as used in the grant of earlier date, I am nevertheless of opinion, that the *vive voce* evidence of the King's surveyor is of paramount weight.

Without entering into any critical examination of the meaning of such words as bank, brink, shore, coast, strand, verge, &c., it appears to me, such terms, when used in deeds as descriptive of land, must be interpreted and construed with relation to the subject-matter ; and when inconsistencies occur, one thing must yield to another, if thereby the intention can be fulfilled, and the instrument be supported. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to the actual survey. In the present instance, that the intention was to grant certain lots and parts of lots, as previously laid out, is clear on the face of the patent ; and it is a settled rule, as observed by me in the case of *Rex v. McGill and Others*, 2 MS. Kep. U. C., that the King's grant, when gratuitous, as this was, is to be construed most favourably for him ; and when for value, most strongly in favour of the patentee, for the honour of the crown.—2 Co. 34 ; 8 Co. 145 ; Hob. 224 ; Plow. 243. If in fulfilling the intention, certain boundaries have been referred to or laid

down, which are upon actual inspection of the ground found to be at variance with it, or irreconcilable with each other, the natural objects called for or specified in the patent, which accord with such intention, may fairly control courses and distances. With reference to the Niagara river, any stranger at the Falls, if asked to point out the bank of the river, weuld doubtless point to the high bank, as answering that call—any topographer or person possessing scientific attainments on such subject, would, I think, promptly do the same. In approaching the river from the high frontier road, any one ignorant of the controversies that have arisen, being told to stop on reaching the top of the bank, would doubtless stay his foot at the summit of the high bank, and not descend to the table rock ; and it is to be borne in mind, that by the patent to Elsworth, the bank spoken of is approached from that direction. The patent speaks of *THE bank*, not *a bank*, or *ONE OF THE banks*—evidently pointing to some supposed conspicuous boundary, entitled to be emphatically called *the bank*. A knowledge of the ground is only requisite, to enable any one to judge what rising ground there best merits the term, and ought to be recognized as answering it. When the bank of the river is spoken of in general terms, *the bank* opposite the falls and a little above them, is the high bank topographically and obviously ; when it is spoken of with a view to particulars in a restricted sense, the bank may mean the edge of the flat below. Thus, in the lease to Mr. Swayze, there can be no doubt but that the bank there mentioned must mean the margin of the flat, for the whole tract lies below the great bank, and is described as one chain parallel to and joining the water. There is no doubt either about the intention. With reference to the flat land, “*the bank*” may be one thing ; and with reference to the river, the bank may be quite a different thing : though, at the same time, if this case rested upon a comparison of the several government descriptions, the similarity of terms in that instrument and the Elsworth patent, could not fail to have great weight. Still, the one description is designed to cover a small tract of the reserve itself, above the falls and in front of the lots.

No. 160 and 159; the other is meant to embrace a tract of two hundred acres, lying behind the high bank, and not below it. The lease comprehends a *part* of the military reserve: whether a part in reference to the whole line of the reserve, or to the depth of it at that point, not being explained. It, however, does not profess to be bounded on the west by the lots 160 and 159. Turning again to the Elsworth tract, we find the point of commencement to be an artificial boundary, ascertained by an operation of survey. The first course thence runs from the river a fixed distance; the second is along the west limit of 159, a fixed distance; the third approaches the river—it is east to within fifty-one chains of the *Niagara River*, thirteen chains more or less. The next is parallel to the *shore* of the river, to the centre of No. 160; thence east to within one chain of the said river; then north along the bank, &c., to the centre of 145; then up the centre thereof twenty-three chains; then south ten chains to the place of beginning. Two natural objects are referred to as governing the front limit—the *river* or *shore* of the river, and the *bank*. If one must yield, which should do so, or can they be reconciled? It appears to me, the *soundest* construction under all the evidence is, that in approaching the river to within fifty-one chains, it was contemplated of course that the bank lay between; and taking what follows into consideration—that the river and bank of the river mean one and the same thing—for when the former is more nearly approached, the limit is said to be within one chain of the said river, a point ascertained to be in fact below the high bank, if measured from the water's edge; and yet it is clear that it was supposed to be above the bank, and not only so, but to be precisely one chain from the top thereof (if the higher bank were intended), for it runs thence along the bank, always at the distance of one chain from the top of the bank to the centre of No. 145, which it could not do if the angle was not formed within one chain from the top of the bank. Then what bank was intended? The answer is, *the bank of the river*, which the deputy surveyor declares was the *high bank*. I am disposed to think a preference due

to the *high bank*, and that it should contract or explain the words "the River Niagara;" because (being equivocal, and it being the sole intention to grant certain specified lots previously laid out) the surveyor on whose operation the description was founded, and with which it was expected to agree, says the *high bank* constituted in his survey and in his reservation, the boundary of the lots in question, The first patent that issued after Elsworth's, was that to Skinner, of certain adjoining lots above the falls. The Swayze lease implies that the front of the Skinner tract descends the high bank, and only terminates on the low-land at the distance of one chain from the edge of the water. Whether it has been always so regarded and occupied, by the owners and occupiers, is not in evidence; but assuming that such is the fact, a marked difference must be noticed between the expressions used in assigning the limits in the respective grants. Skinner's begins within one chain of the Niagara River—a point below the high bank, if taken literally. It then runs from the river; and on again approaching it afterwards, the distances are given as east to within fifty-one chains of the Niagara River; then south parallel to the river; then east to within one chain of the Niagara River; then south, always at the distance of one chain from the river to the place of the beginning. *The river* and not *the bank*, is made the boundary throughout. No room is left for doubt or ambiguity; and it is naturally suggested, that if in February, 1798, the government considered a course run north from within one chain of the river, at the south limit of the Elsworth tract, would constitute a line along the top of the bank, that a similar expression would have been used in April of the same year, upon an occasion on which it would be equally appropriate, a bank along the rapids upwards being if anything better defined, then downwards towards the falls. The curvature of the high bank along the Skinner and Elsworth tracts, assists the presumption that in the one case it was intended to be adopted, and in the other to be rejected or passed over as a boundary. As it is, in the one case the *bank* is designated, and in the *other* the *river* is pointed out as the natural

object to be followed, and to govern the front boundary of the lands respectively. Next follows the patent to James Forsyth, below the falls, in December, 1798. There *the top of the bank* is throughout adopted as the boundary, and is admitted on all sides to be the *precipitous bank*, which if traced up would lead to the *table rock*; but it is to be remarked, that at the point of commencement, and all along the front of the tract, the *high bank at the falls* is *retired* and *diminished*, so as to make the bank overhanging the river in strict propriety "*the bank*," and best answering the call at that place. And the surveyor, who left the reserve on top of the *high bank at the falls*, declares that he did *not* *reserve* it on the *same bank any lower down*. He also said he had placed a post at the *east angle* of each lot, so that a post might have been planted at the limit between 129 and 144, and between 144 and 145 on *top* of the *lower bank*, and between 145 and 159 and 159 and 160 on the top of the *interior bank*, for in truth the bank of the river, opposite 129 and 144, *ceased at the falls*, the waters of the river rising at that point upwards of 100 feet. Had the site of the falls been a mile higher up the river, then the present flats above them would have answered to the term *bank*, as well as those *below* them *at present* sustain *that call*; or were the waters carried on without break or interruption upon the higher level, there would be no such bank at present *below* the *table rock*, and the surveyor and patent have treated the *latter*, so far as it forms a boundary, as terminated in front of the north half of No. 145. A post may have been planted below the high bank, between 160 and 174; but it is clear no post was placed at either of the front angles of the Ellsworth tract, for it terminates at each end in the centre of a lot. It may not be improper to bear in mind, that the great natural curiosity being immediately in front of this tract, and likely to become a place of great public resort, it is improbable the government would have designedly encroached to an inconvenient extent upon the access to it.

Another consideration is, that in all probability the present suit may bind the right of the crown. At all events it would be material and strong evidence against it, the defen-

dant resting the case upon the title and command of the king, whose attorney-general defends the cause.—Doug. 517; 1 Ea. 355; 3 Ea. 366; 1 Price, 278; 3 Taunt. 91, 232; Carth. 181: 11 Price, 736.

Under such circumstances it seems not incompetent to the court to grant a new trial, though there has been evidence on both sides, and the proper conclusion to be drawn from it be doubtful. It is to be further noticed, that this is no new question; and although it does not appear that evidence was given to apply the judgment upon the information of intrusion to the *locus in quo*, I, who tried that case, cannot suppress in my own mind the judicial knowledge which I have, that although in that instance the intrusion complained of might not have been on the bank opposite lot No. 145, still it was upon the top of the high bank in front of the Ellsworth tract, either in front of No. 160, 159 or 145. The same question was involved that is now again agitated, namely, whether the front of that tract was bounded by the upper or lower bank; and the event established the former. The same matter, I am aware though perhaps not judicially, was tried afterwards before another judge in another suit, between the then defendant Forsyth and Capt. Philpotts, which terminated in a like result.

To which is to be added the consideration, that the defendant's claim to hold under Forsyth with knowlege of the circumstances, and that since the acquisition of this interest they have, or at least one of them has, recognized the right of the crown by a memorial and letters in evidence, with which was transmitted to the government the possessory license that Forsyth had obtained from the Lieut. Governor of the province. If the former verdicts were just and right, it is difficult to say the present is not wrong; and, as the plaintiffs claim under one who was a party to the former suits, and have, or one with others, asserting an interest has, in recent communications admitted the right of the king, it seems to me the ends of justice, and a due regard to its consistent and fair administration, require that this case should be reviewed. In concurring in a new trial I would

suggest the propriety of a view had, the better to prepare the jury for entering clearly and fully into the investigation in all its bearings on the next occasion ; for I am not prepared to say that I should feel warranted in disturbing the next verdict, whether rendered for the plaintiff or defendant.

In awarding a new trial, it is requisite to decide whether the patents subsequent to Ellsworth's are admissible against the right of the crown, to assist in explaining or applying the language used in the latter description. The original survey could doubtless be proved, and the patents, as affording evidence thereof, and as pointing out the reservation above and below, may, I think, be looked at. But they still leave it questionable what *bank* was meant in the Ellsworth deed.—5 B. & A. 223 ; 10 B & C. 17 ; 7 B. & C. 334 ; 1 Str. 95 ; 1 Ld. Ray. 734 ; Bull. N. P. 240 ; Peake, N. P. C. 18.

Per Cur.—Rule absolute on payment of costs.

ROWAND V. TYLER.

Where, in an action of covenant to a plea of release, the plaintiff replied, that it was procured by fraud and covin, on which issue was joined, and at the trial it appeared, that before any breach of the covenant, the plaintiff had assigned his interest in the subject matter to a third party, and that this action was brought for the benefit of such third party, whom the plaintiff and defendant had *combined* by the release to defraud ; *Held*, that, under the pleadings, such evidence was inadmissible, as the court could not travel out of the record, and the party interested should have applied to set the release aside.

The plaintiff sued the defendant upon a special agreement under seal. The defendant pleaded a release, and the plaintiff replied that the release was obtained from him by the fraud and covin of the defendant, in the ordinary language of the replication *per fraudem*. The defendant took issue upon the replication.

At the trial evidence was given to shew, that before this action brought, and before the breach of covenant complained of, the plaintiff had assigned all his interest in the covenant (which was to grant a lease on certain conditions) to one Hollinshead : that Hollinshead had entered and built a mill according to the condition which the plaintiff was bound to perform before he was entitled to a lease ; that a

lease had been demanded and refused by defendant, who had ejected Hollinshead; and that subsequently, upon some arrangement made, the present plaintiff executed this general release to the defendant, which was impeached as fraudulently designed by plaintiff and defendant. This evidence was objected to on the part of the defendant, on the ground that the court could not look beyond the record, and take notice of third parties; that the issue raised was whether the defendant obtained this release by fraud and covin practised on the plaintiff, not whether they two combined to defraud a third person; that if the plaintiff had parted with his whole interest, that he no longer had a right of action against the defendant; and that if he had not so parted with his interest, then the release must prevail. The Chief Justice thought the release not admissible, but left the facts to the jury to express their opinion on them; they found the release fraudulent as against Hollinshead, and gave a verdict for 1750*l.* damages, subjected to the question of the admissibility of the evidence. And the question was formally raised again in Michaelmas Term last, and argued in Hilary Term by the *Attorney-General* for the plaintiff, and *Draper* for the defendant. And the court now gave judgment.

ROBINSON, C. J.—Upon the trial it appeared to me to admit of no doubt, that the plaintiff could not be permitted to support this plea by proving, not that the defendant had obtained the release by a fraud practised upon him, the plaintiff, and to his injury, but that he, the plaintiff, had himself fraudulently combined with the defendant to defeat the remedy of a third person, to whom the plaintiff had assigned his interest in the subject matter of the agreement, and for that purpose had given the release in question, in order to bar this action, brought in the name of this plaintiff, but in reality at the instance and for the benefit of the assignee. I allowed the damages, however, to be assessed by the jury, and a verdict to be rendered for them, subject to the opinion of the court, whether the release pleaded could be defeated at nisi prius upon the evidence given; for as the facts appeared at the trial the justice of the case

was certainly not with the defendant, and if it were possible to sustain a verdict upon the present pleadings for the benefit of the assignee, I wished to afford him every facility. I had, in my own mind however, no doubt but that it could not be done, from a recollection of the strong language of the court in the case of *Bouerman v. Radenius*, 7 T. R. 667, in which Lord Kenyon deprecates the confounding law and equity by disregarding the acts and admission of the plaintiff on record, upon the allegation or proof that he was not the person beneficially interested in the subject in litigation. He insisted upon it as an incontrovertible rule, that an admission made by the plaintiff on record is evidence; and as there was in that case proof of an admission by the plaintiff that they had no ground on which to support the action, he held, that admission being satisfactorily proved inevitably made an end of the case, notwithstanding it was shewn that the plaintiffs had but a nominal interest, and where but agents for the parties really concerned in the matter in dispute, who brought the action in the name of these plaintiffs, when they might, if they had chosen, sued in their own names.—2 Esp. Ca. 656. At Nisi Prius Lord Kenyon had treated the point as clear: "Sitting in a court of law," he observed, "I must judge by the record that is before me, and Bouerman & Co. are the plaintiffs. Every admission by the plaintiff is evidence for the defendant." Mr. Erskine cited in argument a case before Lord Mansfield, in which the action was brought in the name of a nominal plaintiff, in behalf of persons beneficially interested, for whom he was trustee. At the trial the defendants produced a release from the plaintiff, which Lord Mansfield held to be conclusive, but said that the Court of Chancery, upon application, would make the trustee pay the principal debt and the costs of the suit.

In banc the other judges entertained as little doubt that the opinion of Lord Kenyon was correct, and their language is not less positive. Lawrence, J., observes, "The present plaintiffs either have or have not an interest. It must be considered that they have an interest in order to support the action; and if they have, an admission made by them that

they have no cause of action is admissible evidence. I have looked into the books to see if I could find any case in which it was holden, that the admission of a plaintiff on the record was not evidence, but have found none." In the case of Alner v. George, 1 Camp. 393, Lord Ellenborough, twenty years afterwards, maintained the same doctrine with equal clearness and force. And I will cite his words, because they are peculiarly and emphatically applicable to the situation in which the parties in this cause stood before me at the trial. Alner having proved a debt against the defendant of 1382*l.*, the defendant met the claim by producing a receipt from the plaintiff in full satisfaction of all demands; but to repel this it was proposed to prove, that before the receipt given Alner had assigned all his effects for the benefit of his creditors; that the defendant had notice of this assignment; that no money had passed on giving the receipt; that the whole was a collusion to defeat the creditors; that Alner was only nominal plaintiff on the record, the action being brought in his name by the trustees, on behalf of themselves and the other creditors.

Lord Ellenborough thought, that "unless Alner was imposed upon, the release was a bar to the present action. If any motion had been made in term time to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look at the strict legal rights of the parties upon the record, and there can be no doubt that a receipt in full, when *the person who gave it* was under no misapprehension, and can complain of no fraud or imposition, is binding upon *him*. The plaintiff *might have released the action*" (as in the case before us the plaintiff did), "and it is impossible to admit evidence of *his attempting to defraud others* and to recognize the transfer of choses in action, without confounding all legal distinctions."

But this is precisely what was attempted in this case, now in judgement, to be done; and unless Lord Ellenborough's judgment can be shewn to have been overruled, nothing more decisive can be desired; but I find nothing contrary to these opinions of Lord Kenyon and Lord Ellen-

borough. So far from it, I doubt whether any point can be stated in which the language and decisions of the courts have been more consistent and steady.—Doug. 407; 1 B. & P. 447; 7 Taunt. 9, 48, 421; 2 B. & A. 370; 4 B. & A. 419; 4 Moore, 192; 7 Moore, 617, 356; 1 Ch. Rep. 390; 2 T. R. 621.

In Skaif v. Jackson, 3 B. & C. 422, 5 D. & R. 290, the same doctrine has to the full extent the authority of Lord Tenterden and the other judges, which shews that there has been no change of opinion upon the point.

The case of Crail and Wife v. D'Aeth, cited in a note in the last case, is expressly to the point, that anything said or sworn by the plaintiff *on the record* (which the court indeed say was too clear to be argued), must be evidence for the defendant: and though at first sight that case may seem to introduce some confusion into the doctrine held in the other cases, by giving sanction to the opinion, that it may be specially pleaded on behalf of strangers to the record that a release from the plaintiff on the record was fraudulently obtained to defeat an action brought for their benefit, it does not upon consideration create any difficulty here, or the propriety of pleading that matter was not brought in question; the defendant knew that he could repel it upon the merits by advancing the fact that the plaintiff was the person really interested, even notwithstanding the assignment, which in reality was made in trust for his benefit, and therefore a release by him was not merely available in strict law, but ought to prevail in justice, and thus the allegation of the receipt being obtained for a fraudulent purpose was denied. If he had chosen to object to the replication by demurrer, rather than meet it upon the facts of the case, I have no idea that it could have been sustained; and indeed in the case of Manning v. Cox, 7 Moore, 617, it was urged by counsel, that this case seemed to point out, that the plaintiff, or rather those using his name, might and indeed ought to plead specially the matter which would shew the release to be fraudulent; but the court take no notice of the suggestion, but adhere steadily to the doctrine, that in a court of law a release given by the plaintiff on the

record must prevail (unless it were obtained by imposition upon him), and that the only course is to apply to the court to set aside the plea of release.

We are all of opinion that we are bound to say here that this verdict for the plaintiff must, upon the same well established principle, be set aside ; and that if relief can be obtained against the release, which stands admitted upon the record, it must be sought by that course, which the many cases upon this point concur in declaring to be the only rule that a court of common law can adopt.

Per Cur.—Verdict set aside.

COWPER v. FAIRMAN.

Debt on bond, conditioned on delivery of *good merchantable grain*, to deliver a certain quantity of whiskey. Plaintiff avers he did deliver the said *distillery grain*, but that defendants did not deliver the whiskey. Declaration held bad on special demurrer.

Debt on bond, conditioned, that on delivery of 1009 bushels of *good merchantable grain* by plaintiff, defendants would deliver 2748 gallons of *good merchantable proof whiskey*. Declaration averred, that although plaintiff did deliver the said 1009 bushels of *distillery grain*, and although defendants delivered part of the whiskey, yet they did not deliver the residue, but wholly refused. Special demurrer, for want of an averment, that the plaintiff had delivered the 1009 bushels of *good merchantable grain*. Joinder in demurrer. And the case was argued by *Draper* for the plaintiff, and *Sullivan* for the defendant.

ROBINSON, C. J.—The defendant, in my opinion, is entitled to judgment on this demurrer. By the terms of the instrument on which the plaintiff sues, he was to deliver to the defendants 1009 bushels of *good merchantable grain*, in such quantities as the defendants might require, within a certain time, in consideration of which the defendants were to deliver to the plaintiff 2748 gallons of *good merchantable proof whiskey*, in like manner and proportion as the defendants should receive grain from the plaintiff. And in his declaration the plaintiff states, that although he did deliver to the defendants the said 1009 bushels of *distillery*

grain (not saying that he had delivered good merchantable grain, as he was bound to do), in such quantities as they required, and according to the said condition, &c., and although the defendants did deliver to the plaintiff 1793½ gallons of proof whiskey, yet they did not deliver to the plaintiff the remaining quantity, 954½ gallons, or any part thereof, according to the said condition.

It is said, in support of this declaration, that the word the authority of 4 Co. 42, and other cases cited, and then "distillery" may be rejected as surplusage, according to the term grain standing alone may be taken to be such grain as the plaintiff was bound to deliver; but before we can treat the word *distillery* as surplusage, which cannot hurt, we must observe, that according to that same authority, and according to reason, it is only when surplusage is not repugnant or contrary to the matter precedent or subsequent that it will not hurt. Now we all know that good merchantable grain and distillery grain are perfectly different things, and may be of different value. Neither does it appear to me that it can be maintained, and the words "the said" and "according to the condition," being used in the averment of delivery, will cure the repugnancy, and particularly on special demurrer.—6 Taunt. 649; Yelv. 111.

If distillery grain and good merchantable grain were the same things, or if the distillery grain which the plaintiff delivered were in fact (as it may have been) good merchantable grain, then the plaintiff might have averred and should be averred, in the words of his agreement, that he delivered good merchantable grain. If, however, (as is more generally the case) the distillery grain delivered was not merchantable grain, but was nevertheless accepted as such by the defendants, then the plaintiff could recover upon a true statement of the facts, but cannot bring himself within this agreement and within this declaration.—1 Ea. 619.

For all that appears, however, upon this record the plaintiff may have delivered such distillery grain as was not good merchantable grain for other purposes; for there was no obligation on the defendants to distil the identical grain delivered, and the defendants finding its inferior quality

may object on that account to deliver the whole quantity of whiskey, to which the plaintiff would be otherwise entitled.

When the plaintiff says he delivered distillery grain, *according to the said condition*, and the defendant demurs, he cannot be said by demurring to admit that such grain was delivered as was required by the condition; on the contrary, he demurs for the repugnancy, in saying that the delivery of distillery grain was according to the condition, when the condition required good merchantable grain. "According to the condition" is more reasonably to be referred to the time and place of delivery.

SHERWOOD, J.—Of the same opinion.

MACAULAY, J.—Had the contract related to a *certain quantity of specific wheat*, represented to be *merchantable*, the word "distillery" might in that case be perhaps rejected in the averment of delivery, when it would read "*the said wheat*," and would refer to the specific grain previously mentioned. For example, had the plaintiff agreed to sell a thousand bushels of wheat then being in a certain mill or storehouse, describing it as good merchantable grain, to be paid for in whiskey; and had he, in allusion to such grain, averred the said distillery grain; the word distillery, being rejected, would make the averment to be "*the said grain*," meaning, of course, the wheat in the mill already specified. But in the present case, no specific grain is agreed to be sold, but only a certain quantity, being merchantable. It is not even declared what kind of grain was to be delivered; neither does the allegation of performance mention what species of grain was delivered; and what it says "*the said distillery grain*," there is nothing antecedently noticed to which "*said*" can be applied—the commodity is not identified by anything going before, and the agreement does not ascertain it with any greater precision. I am disposed to think the declaration bad, upon two grounds, on special demurrer; first, because the plaintiff agreed to deliver good merchantable grain, and only avers that he delivered the said distillery grain, not a word being said in the agreement on the subject of distillery grain; secondly, because the plaintiff has not shewn what kind of grain he did

deliver : it might have been wheat, or rye, or barley, or buckwheat, or oats ; and however fit for distilling, it does not follow that it was good merchantable grain ;—11 Ea. 62 ; Plow. 232 ; Co. Lit. 303 b. ; 1 Chit. R. 39 ; Ld. Ray. 735 ; 5 Esp. C. 239.

Per Cur.—Judgment for defendant.

OSTROM v. O'CONNOR.

Where a declaration in trespass contained two counts—the one for cutting down trees, and the other for carrying them away—and the defendant justified as to the cutting down the trees in the said declaration mentioned, because the close in which the said trees were growing was his soil and freehold, whereupon in his own right he committed the said several trespasses in the said close, in which, &c. ; and the plaintiff demurred specially, because the introduction was inconsistent with the body of the plea, being in bar of only part of the trespasses, whereas the body was in bar of all ; the plea was held sufficient.

Trespass. The first count of the declaration was for felling and destroying trees of the plaintiff, on a certain day, and on divers other days between, &c., at the township of Sydney, then growing and being in and upon certain lands there situate, and carrying away the same, and converting them to the defendant's use. Second count : for taking and carrying away certain trees of plaintiff, at Sydney aforesaid, and converting them to his own use. Pleas : First, the general issue, and three special pleas, on two of which issue is taken. The other is demurred to. It professes to answer only to the felling, cutting down, prostrating and destroying the trees, as in the declaration mentioned, which alone forms the trespass complained of in the first count ; and justifies, because the close wherein the said trees in the said declaration mentioned were growing was at the time, and now is, the freehold of the defendant ; wherefore the defendant, in his own right, at the said several times, when, &c., committed the said several supposed trespasses, in the said declaration mentioned, in the said close, in which, &c., as he lawfully might, &c. : which are the several supposed trespasses in the said declaration mentioned. The cause of demurrer assigned is, that the introduction is inconsistent with the body of the plea, as it purports to be pleaded in bar to part only of the several causes of action in the declaration, while the plea

contains matter which is pleaded in bar to all. *Draper* argued in support of the demurrer; *Sullivan* contra.

ROBINSON, C. J.—At first it seemed to me that the plea must be bad, for want of specifying some particular place in which the trees were cut down, and pleaded *quoad* such place *liberum tenementum*, the action not being for trespass *qu. claus. freg.*, and no place stated except for venue; but as the cause of action in the first count cannot be transitory, there seems to be no objection on that ground.—*Elms v. Lamb*, 6 Mod. 117.

The cause of demurrer specially assigned is grounded on the principle stated in *Gray v. Pindar*, 2 B. & P. 427; and the general issue being pleaded to the whole declaration in this case, as it was in that, there is no doubt that if this plea must be taken in the body of it to apply to the whole declaration and not merely to the “cutting, felling, prostrating and destroying,” the plaintiff is entitled to our judgment—1 Sid. 338. As to the proper construction of this plea, the principle is, that “the plea of every man shall be construed strongly against him pleading it;” *ambiguum placitum interpretari debet contra proferentem*.—Co. Lit. 303, b.

On the other hand, a plea shall not be taken in that sense which is most strongly against the defendant, when such a construction would not be consistent with another part of the plea.—10 Co. 59, b. I am of opinion, that the language of this plea need not be so construed as to cover more than the defendant professes to justify—namely, the felling, cutting down, prostrating and destroying; those are all the trespasses to which a *locus* is assigned more specific than the venne, viz., in *certain lands there situate*; and the trees are said to have been cut down at several times, and these are several trespasses; and having been pointed out in the introductory part of the plea as the several trespasses intended to be justified, the *said* several trespasses fairly means the several trespasses specified, and adding “in the said declaration mentioned,” does not necessarily extend the sense so as to embrace *other* trespasses beside those enumerated in the introduction. Those trespasses are

rightly enough called "several trespasses in the declaration mentioned," and the words "the said" sufficiently point out that *all* the trespasses in the declaration are not justified, but the several trespasses charged to have been committed in the lands or close, viz., the felling, cutting down, &c.

SHERWOOD, J., agreed with the Chief Justice.

MACAULAY, J.—The plaintiff alleges in the first count, that the defendant, on divers days, &c., felled, cut down, prostrated and destroyed certain trees of the plaintiff, growing and being upon certain lands situate in the township of Sydney; no other count speaks of trees being felled, cut down or destroyed. Then the defendant pleads (in addition to the general issue, &c.), as to the felling, cutting down, prostrating and destroying the trees (enumerating them as in the first count) in the township of Sydney, as in the declaration mentioned, that the close in which, &c., was his soil and freehold; whereupon, of his own right, he committed the said several trespasses, in the said declaration mentioned, in the said close, in which, &c., as he lawfully might, which are the said supposed trespasses whereof the plaintiff had *thereof* complained against him. No forced application of the words used is necessary to connect the third plea with the first count exclusively, to which count it is a sufficient *prima facie* answer; therefore the demurrer is ill.—6 Bing. 595.

Per Cur.—Judgment against the demurrer.

During this term the following gentlemen were called to the bar and sworn in, viz.:—JOHN GLASS MALLOCH and GEORGE CHARLES WARD, Esquires.

J. B. ROBINSON, C. J.

L. P. SHERWOOD, J.

J. B. MACAULAY, J.

KING'S BENCH.

TRINITY TERM, 4 & 5 WILLIAM IV.

BERGIN V. PINDAR.

Where a debtor, who absconded from the province, before his departure gave his cognovit for £700 to a person to whom he was not indebted, on which judgment was entered, execution issued, and some money made by the sheriff, and some paid to the plaintiff's attorney, the court, on the affidavits and application of several bona fide creditors of the absconding debtor, ordered the attorney to pay to the sheriff the money he had received, and the sheriff to divide all the money between the creditors who had executions in his hands, ratably, according to their several claims.

In Easter Term, 1830, in a cause of Williams v. Pindar, *Washburn* moved that the money levied on the execution against Pindar should be paid into court, and in the meantime all further proceedings be stayed—not stating on whose behalf he moved: Pindar had then absconded, and the motion was made, no doubt, at the instance of his creditors generally. The motion was founded on an affidavit, in which Bergin, Meighan, Phelan, Laverty and Cattermole joined, setting forth—First (on the oath of each severally), that Pindar was indebted to them respectively as follows: to Bergin, 121*l.*; to Meighan, 300*l.* and upwards; to Phelan and Laverty, 7*l.*; to Cattermole, 20*l.* and upwards; all being for goods sold and delivered; and they all swore that Pindar, on or about the 25th of January, 1830, absconded, leaving property here, in the possession of his wife, sufficient, or nearly so, to pay his debts; that they applied to Pindar's wife, who promised to call a meeting of the creditors, on Monday then next, for the purpose of settling with them; that since that time a judgment has been entered up by confession in favour of the plaintiff Williams, for 700*l.*, and execution for that amount sued out, and delivered to the sheriff, and a levy made thereon; that Williams was a mere pauper, gaining his livelihood by selling cakes in the street; that Pindar's wife declared that her husband owed Williams nothing, and that the whole was a gross fraud, and done for the express purpose of defrauding the deponents out of their just demands;

and that if the proceedings on the execution could be stayed until Pindar could be found, they (the deponents) had every reason to believe they would be able to obtain, if not the whole, at least a part of their demand. This affidavit was made 30th January, 1830, and the statement therein contained was corroborated by an affidavit of Mrs. Pindar. It was further shewn, by the affidavit of Meighan, that he pursued and found Pindar in Albany, in February, 1830, who made a statement in writing, and swore to its truth, setting forth that he never owed Williams more than 20*s.*, but took him and his wife into his house as servants, in some measure out of charity, paying them no wages; that when he was about absconding, he did, at the suggestion of Williams, confess a judgment to him, for the express purpose, and no other, of enabling him to have the property left behind sold in execution, and the proceeds distributed among the creditors. He admitted that he owed the following debts: to Meighan, 32*l.* 6*s.* 10*d.*; Bergin, 12*l.* 10*s.* 10*d.*; Smith, 36*l.* 17*s.* 9*d.*; Prentiss, 28*l.* 15*s.* 9*d.*; Cattermole, not certain; Phelan and Laverty, 7*l.*; Harris, 5*l.*; Musson, 4*l.* 5*s.*; Mosely, 4*l.*; and some other small sums. Williams, he declared, gave no consideration whatever for the judgment, except that he gave him a letter of attorney (which was annexed to Pindar's affidavit, and dated 25th January, 1830), empowering him to sue for and receive all rents, legacies, &c., due to Williams from any person in England, specifying nothing. Meighan, in his affidavit (to which are annexed the affidavit and letters of Pindar), states, that after issuing the execution in Williams v. Pindar, an agreement was entered into between the creditors of Pindar and Williams, that Williams should retain 30*l.*, which was all he demanded, and that the rest of the money arising from the sale of Pindar's effects should be distributed amongst Pindar's creditors in proportion to the demand; that Williams had since refused to comply with the terms of the agreement, and insisted on keeping the whole proceeds of the sale, amounting to 340*l.* and upwards, though the creditors had offered to let him retain 30*l.*, and return him the letter of attorney he had given to Pindar.

To this affidavit of Meighan, was annexed one of Bergin Rutherford and Laverty, in which they depose that they have, heard the affidavit of Meighan read, and that they believe the facts therein stated to be true in all the particulars. This latter affidavit was made 22nd April, 1830, and Meighan's on the same day. Williams shewed cause against this application, and filed an affidavit on the 22nd of April, 1830, in which he acknowledged that Pindar was indebted to him only about 20*l.*, but that he took the confession for 700*l.* because he had given Pindar a letter of attorney to receive all rents, legacies and moneys due to him in England; and he mentioned a devise of land and a bequest of money made in his favour by two relatives in England some years ago, whose death he had not heard of, but supposed they were dead, because they were old and infirm; and in case they were dead, and had not altered their wills, and Pindar should receive any money for him, and not pay it over, he should not be safe without acting on the confession of judgment; and therefore he entered judgment, and took out execution, and levied on all Pinder's goods.

The court did not grant Washburn's application, and did not order the money to be paid into court. It was not, however, paid over to Williams, but remained in the hands of King, his attorney; and the Court made no order for its disposition until the creditors should establish their claims, and become judgment creditors, by obtaining confessions of their debts from Pindar, or if necessary seek a remedy from the legislature, by praying for the passing of a law to facilitate a recovery against absconding debtors—a measure which had been much talked of.

In 1832, such an act was passed. To obtain it, Smith, Prentiss, Meighan, Watkins, Laverty and Bergin joined in a petition to the House of Assembly, setting forth the case, and by the whole tenor of it admitting that they had been and were jointly in pursuit of a remedy against Pindar's effects, which might be ineffectual unless an act should be passed enabling them to proceed against their debtor after he had absconded. They stated further, that King, the

attorney, had at their instance withheld the money levied from his client Williams, and that they had given him an undertaking to indemnify him for doing so; that Williams had thereupon sued King for money had and received to his use; that the jury, convinced that the judgment was fraudulent, had given a verdict for the defendant; and that the Court of King's Bench had been moved for a new trial, on the ground that the attorney could not set up such a defence against his own client; during the pendency of which motion it was, that they had applied for and obtained the act called the Absconding Debtors' Act. On the 19th October, 1831, King confessed judgment to Williams for 269*l.* 7*s.* 8*d.* true debt, the court having set aside the former verdict for the defendant as against law, and the attorney did not intend to resist his client's action further; but it was agreed between him and Williams, through Mr. Draper, who was his attorney for this purpose, that he (Williams) would accept the 30*l.* which he claimed, together with the costs of proceedings, &c.

The creditors of Pindar, or some of them, obtained judgments under the new act; and on their again applying as judgment creditors, which they were now enabled to do, in Trinity Term, 1833, the court made absolute a rule for setting aside the judgment of Williams v. Pindar as fraudulent. On the 13th November, 1833, Mr. King filed an affidavit, setting forth a history of the whole case, in which he stated that at the sheriff's sale of Pindar's goods, Bergin bought to the amount of 59*l.* 9*s.* 6*d.*, and Meighan to the amount of 60*l.*, intending these sums to be set against their respective debts; that the sheriff, nevertheless, urged them for payment; and that he (King) at length consented to take the notes of Bergin and Meighan, for the respective sums, with indorsers, adding in the note their respective proportions, according to their debts, of a ratable contribution, which they and the other creditors had agreed to pay, to make up 40*l.* towards saving King harmless against Williams for declining to pay over the money levied; that Bergin was afterwards made to pay his note, in an action by O'Grady as indorser, but that Meighan's note was still

wholly due; that the other creditors had all paid their proportions of the sum contributed to indemnify King; Meighan's (still unpaid) was 22*l.* 6*s.*; that the verdict in Williams v. King had been set aside, he gave a cognovit to save the costs of another trial, but on the understanding that the cognovit should have no other effect than a second verdict should, if rendered; that, the Absconding Debtors' Act being afterwards passed, some of the creditors had proceeded and obtained final judgment against Pindar; that in Michaelmas, 1832, Smith obtained judgment against him for 57*l.* 14*s.* 2*½d.*; that Bergin had also obtained judgment (time not stated) for 199*l.* 4*s.* 10*d.* and Meighan et al. for 400*l.* 5*s.* 8*d.*; that immediately after the judgment in Williams v. Pindar was ordered to be set aside, he (King) took out execution for Smith, and placed it in the sheriff's hands; that long before the judgment was set aside, he (King) paid William's attorney (Mr. Draper) 30*l.* and the costs in Williams v. King; that he has also disbursed, in defending himself against Williams, more than 40*l.*, the sum which the creditors agreed to contribute for indemnifying him; that he had a set-off, and proved it on the trial of Williams against him, of 19*l.* 12*s.* 4*d.*; that Bergin is indebted to him (King) 50*l.* and upwards, for professional services, and for money lent; and that under the Absconding Debtors' Act, he was served with notice, on behalf of Meighan et al., to retain the moneys and effects of Pindar which he had in his hands. In the same term—Michaelmas, 1833—an affidavit of Robert Meighan was filed, stating that his judgment against Pindar remains unsatisfied; that King promised him that after paying Smith's debt, he would pay over the balance of Pindar's money to him (Meighan); and that he has paid him nothing, though he was indebted to him in a large sum besides, on his individual account. An affidavit of McDermot is also filed, relating to Mr. King's statement respecting Bergin's note, declaring that he agreed with Bergin not to exact payment till he was compelled to pay over to Williams, and declaring that, upon a settlement he speaks of, King did not pretend that Bergin was indebted to him, as he states in his

affidavit. Also an affidavit of the sheriff, stating that in January, 1830, a *fi. fa.*, in Williams v. Pindar, was placed in his hands; that he levied on household furniture, liquors and groceries; that Meighan and Bergin were purchasers at the sale to a large amount; that on his applying to Bergin to pay for what he bought, he stated that he had no doubt the judgment at suit of Williams must be set aside as fraudulent, and that he had bought in order to save some part of his own debt by doing so; he requested the sheriff to keep in his hands the proceeds of the sale until a motion would be made against the judgment, but he refused, unless the amount bid at the sale were paid into his hands and he indemnified against any proceedings Williams might institute; that this being declined, the sheriff prosecuted Bergin for the money bid, and the action was stayed in consequence of Mr. King, as William's attorney, having agreed with Bergin and others to retain the money in his hands, whereupon he (the sheriff) paid to King in money and notes 299*l.* 13*s.* 3*d.*; that on the 9th of November, 1832, an execution against Pindar's goods, at suit of Bergin, was placed in his hands for 201*l.* 5*s.*, besides interest and sheriff's fees—this he returned *nulla bona*; that on the 29th of June, 1833, a *fi. fa.* against Pindar, at suit of Smith, for 58*l.* 10*s.* 5*d.*, besides interest and sheriff's fees, was placed in his hands, and on the 9th of July, 1833, an alias, *fi. fa.* against Bergin; that Meighan et al. obtained a verdict against Pindar for a large amount, but from a difficulty in procuring the sureties required by law, as he thinks, they had not yet taken execution; that on the judgment in Williams v. Pindar being set aside, and on the above mentioned execution against Pindar being placed in his hands, he demanded of King the money of Pindar in his hands, but he did not then or afterwards pay any part thereof, but declared that he had demands against Bergin. Also an affidavit of Bergin, stating that he gave his note to King for the things bought at auction, and the contribution, &c., on the express agreement that it was not to be enforced unless he was compelled to pay Williams; that he owes King nothing, but, on the contrary, upon their mutual

accounts, he considers King to be his debtor in a large sum. All these affidavits, in Michaelmas, 1833, were filed, upon a motion made by Small, on behalf of Bergin, for an order upon King peremptorily to pay over to the Sheriff of the Home District of the moneys in his hands belonging to Pindar, recovered under a fraudulent judgment in favor of Williams, which had been set aside, in order that such moneys may be available under an execution now in the sheriff's hands in this cause, Pindar being an absconding debtor.

Upon consideration of the case, the court on the last day of last Michaelmas Term ordered, that Mr. King do pay over to the Sheriff of the Home District the full amount of money which he has acknowledged (as appears by affidavits filed) to have received as plaintiff's attorney in the suit of Williams v. Pindar, including the amount of a note given to King by William Bergin for goods purchased at sheriff's sale under the execution in the above suit, retaining his taxed costs incurred by him in defending himself against any proceedings on the part of Williams, or such part thereof as has not been compensated to him by the parties interested—Mr. King to file an affidavit what amount of costs remains uncompensated to him, and also deducting whatever sum has been paid by him to Williams, as the amount of his just debt against Pindar, and the costs taxed in such suit. In Hilary Term last *Small* moved on behalf of Bergin for an attachment against King, for not complying with this order, served on him 2nd Dec., 1833; and on 10th Feb., 1834, swore that King had only then paid to the sheriff 60l.

The court in Hilary Term ordered an attachment, which, on the last day of that term, King moved to set aside, on the ground that the attachment ought not to have gone in the first instance, that a rule to shew cause was necessary. The court thought the attachment rightly ordered according to the practice, but directed it not to be enforced till a certain day in vacation, and that in the meantime King may shew before a judge in chambers his compliance with the order, in which case the attachment would be stayed.

In Easter Term *Small* moved in this cause (Bergin v.

Pindar) for an order on the sheriff to pay over to Bergin a sum of money of Pindars in his hands (viz., the money paid to him by King under the rule of court), towards satisfying the *fi. fia.* in this cause. And in the same term King, alleging that he did not understand the rule of court of last term, admitted that he had not arranged the matter; but during the term he filed an affidavit stating that he was paid by several of the creditors in cash, and by a note of hand, 40*l.*, towards the costs of defending the suit against Williams, and that he has no costs uncompensated; that he paid Mr. Draper for Williams, 30*l.* debt and 20*l.* costs, which costs have since been taxed at 20*l. 7s. 4d.* He submits also this account of his settlement of the whole matter, charging himself as follows:

King's account (things bought at the auction).....	£3	7	9
Bergin's do	59	9	6
Meighan's do	60	0	0
Cash from the sheriff	176	16	0
Note and cash towards costs, King at suit of Williams	40	0	0
<hr/>			
	£339	13	3

And taking credit as follows:

Cash paid to the sheriff.....	£153	1	1
Paid Mr. Draper.....	50	0	0
Costs taxed in King at suit of Williams	33	3	9
Disbursed to Solicitor-General besides	2	10	0
Meighan's note, indorsed by Prentiss	82	5	0
Costs taxed in Williams v. Pindar.....	18	7	4
<hr/>			
	£339	7	2
Cash paid sheriff to balance	6	1	
<hr/>			
	£339	13	3

The sheriff certifies to the court that King has paid him 153*l. 1s. 1d.*, and delivered him Meighan's note for 82*l. 5s.*, endorsed by Prentiss. The sheriff also makes affidavit, that the first attachment placed in his hands was in Bergin v. Pindar, to which he returned *nulla bona*; the second attachment was Smith's, and the third Meighan et al., in all which cases executions have issued. In the same term an affidavit of Prentiss is filed, stating that the creditors, including Bergin, acted in concert in pursuing their remedy against Pindar's goods and against Williams and Mr. King, it being understood that whatever was recovered should be ratably distributed; that in 1831, as he thinks, an agree-

ment in writing was entered into to that effect and signed by Bergin; that in consequence they contributed ratably the sum of 40*l.* towards indemnifying Mr. King. Also an affidavit of Meighan to precisely the same effect.

Per Curiam.—Upon a review of these affidavits, it is clear that we should be acting against justice in ordering the whole of the money, which has found its way into the sheriff's hands in consequence of the interposition of this court, to be paid over upon the execution of Bergin, one of the creditors, leaving the others wholly unsatisfied. This would be to act in direct opposition to the agreement of the parties, as set forth in the affidavit of Mr. Meighan of 22nd April, 1830, and expressly affirmed by Mr. Bergin on oath; and we should be assisting one of the creditors to go away with all the fruits of the proceedings, which at much trouble and expense they have been long carrying on for their joint benefit, upon the express agreement that they were to share jointly, in whatever could be ultimately saved from the fraudulent attempt of Williams. Instead of this, we consider it right to restrain all the creditors from enforcing their executions in opposition to their former agreements; and we order that the sheriff shall distribute the moneys of Pindar in his possession among the creditors who have placed executions in his hands ratably in proportion to the amount of the respective executions; that the note of Meighan shall be reckoned as so much money, and that it shall form part of the dividend which upon the distribution will be payable to him.

If it had been important to determine the point, the Chief Justice said he saw no reason why Meighan's note should have been received instead of insisting that the amount should be paid in money, but as his judgment was large enough to exceed the amount of the note, it became wholly immaterial, since it was just that he should receive it as cash, and the other creditors would not by that means be prejudiced.

HAYDON V. CRAWFORD.

A. leased a farm to B., upon the condition that B. was to deliver to him one-half of the wheat to be raised on the farm. B. was to harvest it, and thrash it, and deliver it into the defendant's granary. *Held per Cur.*, that under this agreement, A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that therefore no legal property in the wheat could vest in A. till B. the tenant had thrashed it, and delivered to him his portion.

A party purchasing at sheriff's sale a crop of wheat, may bring trespass against a person converting or injuring it, though he may never have received possession of the field.

Semble, that in order to maintain a title as vendee at a sheriff's sale, it is not necessary to prove an actual seizure antecedent to the sale, and before the return of the writ.

Qære.—Is the sale by the sheriff, of a crop of wheat ready for the harvest, as sale of a mere chattel, not requiring a writing under the Statute of Frauds?—and if no writing is required, still, to satisfy the statute and make the sale legal, should there not be proof of delivery of the wheat, or payment of the price.

Qære.—Where an attaching creditor becomes himself the purchaser at the sheriff's sale, and sues for a trespass to the property purchased, should he prove a debt to support his attachment.

Trespass for cutting and carrying away a quantity of wheat growing in a field. Plea, the general issue. Upon the trial before the Chief Justice, at the last assizes for the Home District, the following facts appeared. One Enos Stone had taken a lease of the defendant's farm in Whitby for four years, excepting a dwelling house, out-houses, and a few acres around them, which the defendant reserved for his own occupation. By the terms of the lease or agreement, which was very special, Stone, the tenant, was to deliver to the defendant one-half of the wheat to be raised by him on the farm. He was to harvest and thrash it, and deliver it to the defendant's granary. In October, 1832, during the term, Stone being involved in debt absconded, leaving his wife and family living on the farm, and leaving among other things a crop of wheat in the ground, 15 acres or more, which he had sown a few weeks before. Haydon, the plaintiff in this action, claiming to be his creditor, sued out an attachment against him under the Absconding Debtors' Act, returnable in Hillary, 1833, which attachment was delivered by the deputy-sheriff to a bailiff to be executed. In August, 1833, about the time of harvest, the deputy-sheriff went to Whitby, and exposed the crop of wheat to sale by public auction as perishable goods, under the 8th section of the statute. The defendant was present

at the sale, and forbade any one purchasing, claiming the field of wheat as his, and threatening any person who should purchase it with a law suit. The deputy-sheriff nevertheless proceeded in the sale, and the plaintiff, Haydon, who had sued out the attachment, became the purchaser at the price of 8*l.*, being the only bidder. The whole crop was not put up to sale, but only Stone's interest in it. The field was stated to contain about eighteen acres. It had been appraised according to the act: and the sheriff's appraisers valued it at five dollars the acre. A witness, who examined it on the day of the sale, thought the field would yield about twenty-five bushels the acre, and considered the crop as it stood to be worth about 2*l.* the acre. It was proved that the present defendant, on the Monday following the sale, went with his workman into the field and cut and removed the wheat into his barn, which was the trespass complained of. The defendant took several exceptions, which he moved as grounds of nonsuit. 1. That Crawford and Stone were by the lease made partners in this wheat field, and that Haydon could not as assignee of Stone's interest, sue the other partner, Crawford, in trespass for taking the wheat. 2. That it was not proved that the wheat was actually seized or attached before the return day of the writ of attachment. 3. That the evidence established no trespass, for the wheat was only taken to the barn in which it was to be stored. According to the lease Crawford's half was to be delivered to him there, and Stone, the tenant, was to be permitted to keep his share of the crop in the same barn. The Chief Justice, before whom the cause was tried, refused to nonsuit the plaintiff on either of these grounds, but noted them, and reserved to the defendant the right to move for a nonsuit upon them in term.

In the course of his address to the jury, the defendant's counsel insisted upon this further objection to the plaintiff's case. That after Stone absconded Crawford, as his landlord, entered upon the farm which his tenant had thus abandoned, and was in actual possession of this field, repairing the fences and taking care of the crop up to the time of the sheriff's sale; and that Haydon never had possession.

The Chief Justice recommended the jury to give the plaintiff a verdict for damages, according to their estimate of the value of the wheat which he had purchased, leaving the legal objections to be afterwards considered. They found for the plaintiff, and 33*l.* 4*s.* damages.

In Easter Term *Small* moved to set aside the verdict, and enter a nonsuit upon the points reserved, or for a new trial upon the ground that the verdict is against law and evidence, and for excessive damages, and upon facts disclosed on affidavits. *Sullivan* argued against the rule, and *Draper* in support of it.

ROBINSON, C. J.—With respect to the points reserved at the trial as grounds of nonsuit, I am of opinion that under this agreement Crawford and Stone were not partners in the wheat while it grew in the field; that the relation between them was simply that of landlord and tenant, the rent being payable in kind, and uncertain in amount, instead of a fixed rent in money. That no legal property in any wheat raised on the farm could vest in Crawford till the tenant had thrashed and divided it, and delivered to him his portion. If the tenant should fail to deliver over half, the landlord would have his remedy as upon other covenants, but the tenant might before division legally alienate the whole, and might maintain trespass against any one, even against his landlord, who should wrongfully interfere with his possession of the field or the grain growing on it.—Bull. N. P. 85.

In regard to the second objection, I have never understood it to be necessary, in order to maintain a title as vendee at sheriff's sale, to prove an actual seizure antecedent to the sale and before the return of the writ; but perhaps when the purchaser is the person at whose instance the process issues, the presumption that the sheriff has complied with the requisite formalities will not be entertained, and further evidence may be required. In this case there *was* evidence, and such as to warrant the jury in concluding that there had been a seizure before the writ was returnable, so that I could not properly have allowed a nonsuit on that ground. And it is not a point to be discussed now, for in the affidavits

which the defendant had filed in moving for this rule there is express and abundant evidence that Underhill, the bailiff, did go to Whitby in December, before the return of the writ, and attach the crop of wheat in question.

As to the third point, it is involved in the first. If Stone had remained, Crawford could not, against his will, have gone into the field and cut the wheat and taken it to the barn, although it is true that by the lease his half was to be taken there by Stone, and the other half might be taken there also if Stone chose. Besides, no damages were claimed but in respect of Stone's share of the wheat, which Crawford's conduct at the sale and throughout up to this moment plainly shews he took possession of for himself, claiming and vindicating it as his own, and not under any pretence of storing it in the barn for Stone or his assignee.

On moving against this verdict last term, it was insisted upon as a further objection, that the plaintiff ought to have proved a debt to support the attachment; and it was also urged, that Haydon never having been in actual possession of the crop of wheat, was not in a situation to bring trespass. The first of these points was not agitated at the trial; the second I take to be the same in substance as the defendant's counsel adverted to in his defence at the trial, though it was not expressly made one of the grounds of his motion for nonsuit. The plaintiff in this action being the person who sued out the attachment, it may be argued, that by analogy with cases, when vendors are to make title to goods purchased by them at sheriff's sale under a *fi. fa.*, it was necessary for Haydon to give proof of a debt, because he must be supposed to be cognizant of the truth in that respect, and is not in the situation of a stranger purchasing. For the sake of precluding any question, it would have been prudent to give evidence of a debt, but I am not satisfied that it was necessary. The plaintiff is not disputing the property of these goods with Stone, the former owner, he is bringing trespass against a third party, for tortiously converting goods which were bid off to him openly at sheriff's sale. An attachment having issued, and the crop of wheat having been attached under it, it followed as a necessary

consequence, that the crop, which was most clearly perishable goods, should be converted into money, without waiting the termination of the action, and consequently before it could be ascertained satisfactorily whether there was a debt or not. It was no less requisite for the interest of Stone than that of Haydon that the crop should be sold when ripe, whether a debt was due or not, so long as a debt was claimed and an action was depending. But this intermediate proceeding of selling goods perishable attached cannot take place unless some person will buy. I do not feel it necessary to enter upon a critical examination of this question, because no such exception was urged at the trial; and it would be serving no purpose of justice to entertain it now, when it appears before us on the affidavits filed that Haydon has actually obtained judgment against Stone, so that there can be no doubt that the proof would be given upon another trial. As to Haydon's never having been in possession of the field of wheat, and being unable on that account to bring trespass, I take it to be clearly settled, that a man may become the absolute owner of a chattel by purchase without seeing the chattel, and without the performance of any visible act of receiving possession; and it is equally clear that such purchaser, without ever having had actual visible possession of the chattel, may bring trespass against any one who wrongfully converts it or injures it. It is enough if he has the exclusive property in the chattel, and a right to the immediate possession of it.

The consideration of this point, however, has opened to us two or three questions on which we have doubt. What the facts may have been I do not know, but it was not proved that Haydon, at or after the action, paid the amount bid or any part of it, or gave any acquittance on account of his debt to Stone; nor was it proved that he ever went into possession of the field, or was put into possession of it symbolically or otherwise, nor that a bill of sale or memorandum of the sale, such as would satisfy the Statute of Frauds, was made on the occasion. I am not satisfied that on any of these grounds the plaintiff can be held to have failed in his case. At present I shall only refer to the cases

of Parker v. Staniland, 11 Ea. 362; Crosby v. Wadsworth, 6 Ea. 602, and Mayfield v. Wadsley, 2 B. & C. 357, 5 Moore, 79; and without saying, that in my opinion this sale of a growing crop ready to be harvested, made by the sheriff under the *f. fa.*, is within any of the sections of the Statute of Frauds, I am nevertheless induced, by the doubt which we entertain among us upon that point, to give relief against this verdict, which, I think, was for a sum altogether too high in any view of the case. There would be no reason in holding, that because Haydon bid off the crop at 8*l.* he should not therefore have the full value of the goods purchased, supposing them to have been wrongfully taken from him; and I expressed this opinion to the jury, but they went far beyond that. According to the appraisement directed by the sheriff, the value would not have exceeded 10*l.* or 11*l.* The jury gave 33*l.* They very probably thought the defendant's conduct was in some respects disingenuous and artful; and, as juries frequently and naturally do, they may have felt it right to shew that such attempts must recoil upon the party making them. But, on the other hand, much consideration is due to the fact, that Stone seems to have been an idle unprofitable tenant, who absconded, and left his landlord's farm to lie waste. Crawford had interests to a certain extent to protect under these circumstances; and it is not extraordinary that he should assume more than a mere stranger would have any pretence for doing. It seems besides doubtful, whether, without his care, throughout the summer, there would have been any crop forthcoming; and upon the whole circumstances of the case, I think 33*l.* was much too high a sum to make him pay for the trespass. I lay no stress on his affidavits, which would make the value of the wheat trifling indeed, and which assert several new grounds of defence not proved at the trial; because so far as these facts could avail, no reason is shewn why they were not proved before the jury, instead of being now advanced for the first time. Upon the ground that the damages are under the circumstances unreasonably high, I am in favour of a new trial; and as I am not clear upon the law of the case, under the evidence that was given, I

am the more induced to allow the case to go to another jury ; and I think the costs should abide the event. If our doubts arose wholly upon points not agitated at the trial, then, according to the case of Sutton v. Mitchell, 1 T. R. 20, the practice would require that the defendant should pay costs ; but it is not altogether so, for the objection, that Haydon had never been in possession, and was not in a situation to bring trespass, was urged at the trial, and in effect that involves the question to which I have adverted. My present inclination, however, I must say (speaking only for myself) is in favour of the plaintiff. I think, on the authority of cases which I have cited, that we should regard this sale of a crop of corn ready for the harvest as the sale of a mere chattel, and therefore not requiring a writing to make the alienation of it legal. Regarding it as the sale of a chattel, no writing would be necessary under the 4th sec. of the statute, which applies only to the cases of executory contracts for the sale of goods. And besides there are other considerations which, I think, deserve weight, arising from this being a sale by a public officer, under the direction of legal process, and the question arising in an action of trespass against a third party, not in an action brought to enforce any alleged contract of sale against a party charged as having made the contract. In my apprehension of the law, there remains but this question at common law, rather than under the statute (See 2 T. R. 26), whether in the evidence a sale was so proved as to shew a change of property and a vesting of the goods sold in Haydon, no money having been shewn to be paid or tendered, and no delivery of possession up to the vendee ; and my impression at present is in favour of the plaintiff. The deputy-sheriff swore that he sold him the crops, he no longer retained possession, but treated and regarded him as the purchaser ; and where there is no actual possession in another person, the possession follows the property.

MACAULAY, J.—The defendant is not a mere wrong-doer ; and there being no proof of any actual possession in the plaintiff, it was incumbent on him to prove title, that is, a right of possession and property, to enable him to sustain

trespass. In proving title, I think the seizure of the grain under the attachment sufficiently in evidence, but doubt the adequacy of proof as respects the plaintiff's right as a purchaser. If the sale is within the Statute of Frauds as an interest in the land there is no written evidence of a contract, and if not, there is no proof of delivery or payment of the price; nothing to shew that the plaintiff had entitled himself to possession, by complying with the conditions of sale, which would be presumed to be payment in hand before receiving possession in the absence of proof to the contrary.

It may possibly be a question, whether, as being the original plaintiff, proof of his debt might not be required, considering the interest the defendant had in the crop, though not a partner strictly speaking. At all events, the damages, according to the evidence, are excessive, and though the defendant may be liable in trespass, the circumstances do not call for damages beyond the actual loss of the plaintiff, or at least the actual value of his portion of the crop. He was to pay 8*l.* for it, but whether paid or not does not appear.

Per Cur.—New trial without costs.

MCKINNON v. BURROWS.

In an action for breach of covenant for good title, no damages can be recovered for improvements, or the increased value of the land, the purchase money and interest forming the measure of damages.

Covenant. By indenture of bargain and sale, dated 18th Dec., 1828, defendant conveyed a tract of land to the plaintiff, and covenanted that he was the true, lawful and rightful owner, and lawfully and rightfully seised in his own right in fee of the premises therein specified. The breach assigned is, that the defendant was not the true, lawful and rightful owner thereof in his own right in fee; to which the defendant pleaded, that he was the lawful and rightful owner, and was lawfully and rightfully seised in his own right in fee, concluding to the country.

It was proved at the trial, that the original consideration

was 110*l.*; that improvements to the extent of 150*l.* had been made by the plaintiff since the execution of the conveyance: but that the estate was not worth as much at present as it had been some years ago. A question was raised respecting the damages which the plaintiff could recover in this suit, namely, whether the price paid for the land with interest, without regard to the rise or fall in value of the estate, or such price together with the value of improvements subsequent to the date of the deed. A verdict was rendered for the plaintiff for 243*l.* damages, to be reduced 100*l.* included for improvements, leaving 143*l.*, the original purchase money and interest, should the court be of opinion that the 100*l.* is not recoverable in this action.

The point was argued in last term by *Draper* for plaintiff, and *Sullivan* for defendant.

ROBINSON, C. J.—The question is one of general importance, and the principle which should govern the decision is one which in the course of things must be frequently applied. But yet there is not much to be found in the books upon it. There is, nevertheless, enough to convince me that the jury ought not to have allowed damages for improvements made since the covenant, and that we should not be borne out by authority in sustaining their verdict for anything beyond the purchase money and interest. If we consider the question upon the analogy with cases arising upon the sale of personal property or contracts, with a view to the sale and delivery of personal property, there would seem to be little room for doubt: and I do not know upon what ground it can be held that a like principle should not prevail in both. The cases cited in the argument were for the purpose, I suppose, of illustrating this view of the question, but they are not very applicable, and bear very remotely upon it.—3 B. & A. 288, 626. I would refer rather to 2 Burr. 1010; 8 T. R. 162, and Gainsford v. Arnold, 2 B. & C. 629, as establishing what is generally admitted, that upon the failure of agreements to deliver goods, transfer stock, &c., the right measure of damages is the value of the article at the time when it ought to be delivered. Undoubtedly it may in many cases happen, that such damages will

by no means be a recompense to the plaintiff equivalent to the actual performance of the agreement, but still it is to be considered, as the measure most consistent with the object which the parties had in view in entering into the contract. Now in reason, I think, that the value of the estate when it is handed over by the deed at that point of time when the vendor covenants for title, and that the vendee shall enjoy it, is to be taken as the measure of damages, by the same rule as the value of goods, when they were expected to be delivered upon an executory contract. Relying upon his covenant, the vendee may have improved his lands: and so also, relying upon the punctual delivery of goods under a contract, the covenantee may have made various arrangements in consequence, subjecting himself to liabilities or opening a prospect to great profits, so that his inability to complete the arrangements made on the faith of that covenant may produce a loss much beyond the bare value of the article to be delivered. If it be just then, as is decided, that the value supposed to be in the contemplation of the parties at the time of the agreement should be the measure of the damages on sale of goods, I can see no ground on which the same principle should not be applied upon the sale of lands.

Again: when goods are sold there is always an implied warranty that the vendee has a right to sell; but (not to speak of cases of intentional deceit) where it turns out otherwise, the vendee receives back his purchase money and interest only.

The same principle applies in case of warranty generally upon the sale of goods; and when anything beyond is allowed, it is upon some particular ground, well settled and reasonably to be accounted for—as for the keep of a horse, when the vendor has refused to take him back. If the purchaser of my horse upon express warranty were to be at considerable expense in having him broke to harness, and were to sue upon the warranty for his unsoundness, or upon the implied warranty of title, if the horse proved to be the property of another, I find no authority for holding that he would recover (in the absence of intentional deceit) any-

thing beyond the price given for the horse and interest, though he might be considerably the loser.

In the civil law the principle which thus restricts the damages to the price paid, without suffering them to be enhanced by subsequent events or acts not within the contemplation of the parties is recognized, subject to some modifications in peculiar cases, and is explained at large in Pothier on Obligations, pages 91, 97.

Supposing that no rule could be drawn from adjudged cases in respect to the transfer of personal property, upon reason and general principle it seems to me, that there are strong and obvious objections against holding a vendor of real estate liable of course upon failure of title to indemnify the vendee in the value of his improvements. He knew that in contemplation of law it is not thought reasonable to exact of the last purchaser of estate a covenant for title against all the world. He is admitted to do all that is just and reasonable if he covenants, that notwithstanding anything done or suffered, &c., by himself he has right to convey. And the courts reluctantly give to his covenants for title a more extended signification, but rather restrain them by construction to that reasonable limit, where they can do so with any propriety. As, where accompanying covenants are qualified, they hold that it must have been intended so to qualify the covenant for title, though the latter contain not the restraining words.—See *Browning v. Wright, &c.*—2 B. & P. 13: 8 Taunt. 543; 3 Lev. 46.

Still it sometimes happens that the vendor of an estate will imprudently covenant in such absolute and unqualified terms, that he must be held to covenant for title absolutely, and against all the world; but if in such cases it seems hard and unreasonable, where there has been no fraud, to make him answer for defects in antecedent titles of which he was unconscious, and of which his vendee had the same means of judging as himself, how would this hardship be increased if he was bound to answer beyond the extent of the consideration he received, and perhaps even in twenty times that sum, in consequence of improvements which his vendee has made.

I am satisfied the attempt will be in vain to shew by any adjudged case that such an effect has been given to this covenant in England, and every argument *ab inconvenienti* is against giving a greater effect to the covenant here, from the peculiar state of things in a country which like this is in a progress of rapid settlement. A lot of land which ten years ago was sold as the ordinary farm of a settler, for one or two hundred pounds, has become perhaps in the meantime the site of a village, and if damages in case of default of title could be claimed upon a computation of its present worth, founded upon the rise in value and the buildings erected upon it, without regard to the consideration received by the person who entered into the covenant, the consequences to the vendor must be utterly ruinous. I have no doubt that cases might be shewn in which a town lot sold for 10*l.*, has now, by subdivision and the erection of buildings, become a property worth thousands of pounds ; and it would be monstrous indeed if the responsibility for the title must under such circumstances fall without limit on the first vendor. And more especially in this country, where provision is made for the registry of all titles, thereby generally affording to all persons equal means of information in respect to their validity. It is more reasonable to hold, that before a purchaser ventures to add greatly to the value of an estate he has bought, by erecting buildings or making other improvements, he should satisfy himself of the completeness of his title, remembering that the covenant of the person from whom he bought, if entered into in good faith, ought not in reason to be enforced to an extent more than commensurate with the consideration he received ; and that the responsibility of greater investments upon the property ought not to be arbitrarily and heedlessly thrown upon him at the pleasure of another.

In examining how the case stands upon authority, we have not the satisfaction of being able to rest our opinions upon any judgment of a court expressly in point ; but there is no want of evidence, I think, of the prevailing understanding upon the question. The language of the courts, and of writers, seem all to tend one way. And I find no-

thing to support a claim for damages in respect to improvements made by the purchaser, always excepting the case of intentional deceit, which it is not necessary at present to go into the consideration of. In my mind, the acknowledged principle and effect of the warranty or covenant real, should in reason and justice govern the modern remedy under the usual covenant for title. And the effect of the warranty, it is plain, was to give the value of the land at the time of the alienation.—4 Co. 12 b.; 2 Bl. Com. 300. It was urged, as an argument against this, that in Plow. 323, it appears, that in order to restrict the recovery to the value of the land warranted at the time of the sale, it was considered necessary to plead that the value of the land at that time was only so much, and to shew that its present value has been enhanced by subsequent acts or circumstances; but if the pleading that fact would avail to restrict the valuation, it must follow, that in contemplation of law nothing more than the value of the land at the time of the feoffment was warranted, or it would signify nothing to account for the cause of the increase of value.

The case of Lewis v. Campbell, 8 Taunt. 727, was by the assignee of a lease upon a covenant for quiet enjoyment; and there the court seemed strongly to incline against the right of the plaintiff to recover for improvements. I find in several treatises of text writers, that in treating upon the remedy under covenants for title and quiet enjoyment, they seem to contemplate only the recovery back of the purchase money and interest, and to regard those covenants as affording a remedy in that respect only commensurate with the warranty formerly in use, with this additional advantage, that it could be enforced against the personal representatives of the covenantor.—4 Crui. 87. Now in Cruise's Digest, it is said, "When a purchaser whose title is secured by covenants of this kind, is evicted by any person claiming under the vendor, or any of his ancestors, the purchaser may maintain an action at law upon the covenants for *the restoration of the purchase money.*" Sugden, in his Law of Vendors, is to the same effect. It has been suggested that this claim is increased to value of improvements and rise in

value, is supported in principle by the case of *Kingdom v. Nottle*, 1 M. & S. 355, recognized in *King v. Innes*, 5 Taunt. 426. If the heir can bring an action on the covenant for title entered into with his ancestor, and broken in the time of his ancestor, and in fact broke the moment it was made, upon the principle that the breach continues, and so the covenant is broken with the heir as it had been with the ancestor, then it is argued that in this case it may be said this covenant is broken after these improvements made as well as before, and as damages are to be estimated at the time of the covenant broken, damages for these improvements may well be included. But, in my opinion, this is not a reasonable deduction from those cases. The effect of what is there decided is, that the remedy for breach of covenants, if it is not sought and used by the ancestor, descends to the heir. In those cases the ancestor, though not evicted, might sue; but if he forbears, and dies retaining possession, his heir succeeds to the estate and the covenant attached to it; but I see no ground or reason for saying that it shall be a stronger or more extensive remedy in his hands against the covenanter than it would have been in the hands of his ancestor. That question is not affected by these cases.

In this case the verdict should, I think, be reduced, by striking off the sum allowed for improvements.

MACAULAY, J.—Covenants of this description have been substituted for the old system of warranty, and run with the land until eviction; and though broken as soon as entered into, they nevertheless follow the estate previous to eviction, and impart to the person sustaining the ultimate loss a right of action unless put in suit by some prior possessor. When once enforced, no subsequent remedy subsists (unless under special circumstances and a qualified recovery). Being broken, however, in the first instance, the damages related to the time of the breach, and by analogy it would not seem that more can be recovered than the value of the estate as sold—in other words, than the price of the same and interest—although less may be awarded in the discretion of the jury; as where, though there be shewn a nominal defect of title,

there has been no disturbance of a quiet enjoyment and no reason to apprehend any. The value of the land would only be allowed in contemplation of a total loss of the estate, either by its restoration or an adverse expulsion.—
30 Edw. III., 14 b.; 19 H. VI., 46 a., 61 a.; Godb. 53, 151; Plow. 323; 2 Roll. Ab. 772; Bro. Protest, 30; Noy. Rep. 142; Fitz. N. B. 134, k.; Hob. 21-2; Co. Lit. 365 a., 385; 1 Co. 15; 4 Co. 63; Skin. 42; F. Jones, 195; Freem. 41; 2 Freem. 106, 173; Co. Lit. 32, a. n.

Per Cur.—Damages to be reduced to price paid and interest.

SMITH V. WHITING.

A forwarder is a common carrier, and is not liable for loss, arising from the act of God, or the King's enemies.

Case brought by the plaintiff, a merchant, against the defendant as a common carrier, in consequence of the loss of a boat load of merchandise, which the defendant had received and undertaken to forward from Montreal in Lower Canada to Toronto. The general issue was pleaded. It was admitted that the defendant was a *forwarder* (which the court held to be a common carrier), and that goods of the plaintiff to the value of 265*l.* 16*s.* 3*d.* were placed in his hands to be forwarded to York. These goods, it was proved, were put on board one of the defendant's boats at Lachine, to be carried in the usual manner of transporting merchandise to Brockville, from whence they would be sent by a steamboat to the place of their destination. The boat or batteaux in which they were sent from Lachine was proved to be a good boat, well manned, and under the charge of a faithful and skilful conductor. When the boat arrived at the Coteau du Lac, in ascending the river St. Lawrence, it was then attached to a steamboat to be towed up to Cornwall, which it was proved was the usual course in transporting merchandise, and had been so for many years, being found to be safer and more expeditious than leaving the boats to be navigated across the lake St. Francis by their crews. When the boat left the Coteau du Lac, towed by the steamboat, which was at seven o'clock in the evening,

the weather was fair, and the wind light and favourable; but towards midnight the wind increased and rose to a violent gale, occasioning a great swell; and a dense fog having also arisen, the master of the steamboat brought her to anchor in the river, thinking it the most prudent course for the boat in question, and others which he had in tow. In this situation the steamboat lay, with her head to the wind, the batteaux which was lost and two others being astern of her, and the current of the river which was very strong flowing in a direction opposite to the wind, and impelling the batteaux towards the steamboat; the rope by which it was towed being kept of such a length as to leave the stem of the batteaux about six feet distant from the stern of the steamboat. The conductor and his crew were compelled to use their poles in keeping off the batteaux from the steamboat, from the time the steamboat anchored till the batteaux was lost. It was proved that the master of the steamboat was vigilant and active in his care of the boat which contained the plaintiff's goods; and that the conductor and crew of the boat also used all possible caution to prevent loss, but that nevertheless about four in the morning the boat struck against the stern of the steamboat and filled with water and sank; in consequence of which the plaintiff's goods were wholly lost. The manner in which the accident occurred, and also the course of the trade in respect to the mode of transporting goods on the river, were clearly and satisfactorily stated to the jury by intelligent witnesses. The defendant's clerk, an indifferent forwarding merchant, the captain of the steamboat, and the conductor of the batteaux, and a passenger in the steamboat, were examined at the trial; and the Chief Justice submitted the following questions to the jury.

1st. Was the loss occasioned by accident, occurring from unusual stress of weather, a violent gale having arisen in the night, and the difficulty being increased by fog and darkness?

2ndly. Was there a want of care and skill in the master of the steamboat, in being overtaken in the place in which he was by the gale, when it occurred?

3rdly. When the gale occurred, was there any want of care or skill in any person, which occasioned the loss of the cargo, when otherwise the same might have been saved?

4thly. Are the jury satisfied that the loss of the cargo would not have occurred if the batteaux had been taken up by her crew and not towed by the steamboat, although it could not have occurred in precisely the same manner: or do the jury think it would have been less likely to have occurred?

The jury gave it as their opinion that the loss did occur in consequence of stress of wheather, in the manner stated in the first question: that there was no want of care or skill in any person concerned: and that the loss would as probably have occurred under the circumstances, if the batteaux had been taken up by her crew, instead of being towed; and they found for the defendant. This verdict, however, was taken conditionally by consent, with leave to move to enter a verdict for the plaintiff, if the court should be of opinion that on the facts of the case he was entitled to recover; and in Easter Term last, the case was argued by *Draper* for the plaintiff and *Sullivan* for the defendant.

ROBINSON, C. J.—The evidence given was minute, and it would be tedious to recapitulate it. It fully bore out the finding of the jury, in my opinion, in each particular. It appeared, I believe, in the same light to my brothers, when reported to them last term; and as no application is made for a new trial on the merits, I conclude that the verdict of the jury is not complained of. I put the several points thus particularly to the jury, because I observed that the case, upon the opening of counsel, was treated as one of much general interest and importance in a commercial view, and upon which the decision of the court was looked to with some interest. I was therefore desirous that we might have materials for forming a judgment upon whatever questions might be raised; but I confess I did not then see and do not now see what particular doubt the case is expected to remove.

Having stated the facts and the finding of the jury upon them, I must say that I see no ground whatever for disturb-

ing the verdict which the jury rendered for the defendants, and which was understood and agreed to be entered conditionally, merely with the understanding that the court might direct a verdict for the plaintiff for the value of the goods, if upon the finding of the jury they should be of opinion that the plaintiff was entitled to recover. Except in one particular, which I shall presently mention, the case seems to be wholly and remarkably free from doubt or difficulty.

Upon the evidence, I regard the defendant as undertaking for him to carry the goods of all persons indifferently, and therefore a common carrier, with whatever liabilities and exemptions attach to that character under the law of England. It follows that, as the plaintiff's goods have been lost while he was carrying them, he is liable to make good that loss, unless it happened by the act of God or the king's enemies, for in these cases only is he exempt. The jury find, and I think rightly, that the loss did occur in consequence of the act of God, and without any negligence or fault of the defendant. The storm was unusually violent and was the direct cause of the injury. Whenever a doubt arises upon the facts of a case of this description, it is the province of a jury to determine whether the loss is rightly to be ascribed to the act of God, or to the negligence, or unskilfulness, or wilful default of the carrier; and in many cases, presenting more room for doubt than the present, their verdict has been allowed to be decisive in favour of the defendant. The effects of storms, such as occurred in this instance, are among the dangers of navigation against which it is usual for the owners of goods to secure themselves by insurance; for it is well known that carriers do not insure, and are not expected to insure against the elements.

It is desirable, I think, for all parties not to attempt too great refinement in drawing the line between the act of God and the ordinary dangers of navigation, against which skill and prudence may guard, because that would encourage litigation in most cases of loss, from the uncertainty of the decision, each party hoping to shift the loss upon the other. It is better for the parties themselves to be impressed with

the conviction, that if they wish to be secure against all dangers, they must be careful to insure. When they fail to do so, it should be considered that they take the risk of tempests upon themselves, and they should not seek to be rigid in throwing upon the carriers such risks as they ought to have guarded against by insurance.

The defendant happened to be connected with an inland insurance company at Montreal, but it was not contended that it was his duty to insure goods committed to him to forward, unless specially instructed so to do, or that he was accustomed or expected to do so; indeed, the contrary was shewn. The only peculiar feature in the case is, that the accident happened while the boat was towed by the steam-boat, and the proximate cause of the loss was their coming in contact. From hence I imagined it was intended to be strongly insisted upon, that the forwarder had rendered himself liable by deviating from the ordinary course of navigating the boat, and adopting at his own risk and for his own convenience a new mode of transportation, not contemplated by the owner of the goods. But this has not been relied on in argument; and it could not have been with justice, for it was proved that the mode of towing across this large sheet of still water has been constantly pursued for more than seven years, and is the one most approved of and desired by the merchants themselves. And, at all events, the finding of the jury removes this ground of objection.

Upon the argument, several cases were cited for the plaintiff, where carriers had been held liable even notwithstanding, by their notices and terms of contract, they could claim to be exempt; but those were all cases where wilful misconduct or negligence was brought home to them, and nothing can exempt them from answering under such circumstances. Here negligence is distinctly negatived.

MACAULAY, J.—The jury have negatived all charge of negligence in the conduct or management of the batteaux or steamboat, and of unwarrantable deviation in the mode of transport; and the loss appears to have been occasioned by the tempestuous weather. Though ordinary natural causes

may have in some measure contributed towards the accident, yet the proximate cause was the sudden easterly gale; which is proved by the observation, that if the wind had not prevailed, no injury would have been sustained. Being the act of providence, the defendant is therefore exonerated and the verdict in his favour sustainable.—1 Str. 128; 1 Vént. 190, 238; 2 Lord Ray. 918; 3 Esp. 127; 1 T. R. 27, 33-4; 4 Doug. 287; 4 Bing. 607; 4 M. & P. 540; 3 Doug. 389; 5 T. R. 389, 399; 4 T. R. 281; 1 Wils. 281; 5 Ea. 428; 12 Ea. 381; Hob. 18; Bull, N. P. 69, 70; Burr, 2827; 2 Lev. 69; T. Ray. 220; Cro. El. 495; Owen, 57; Poph. 115; Moor, 457; Noy. 36.

Per Cur.—Rule discharged.

MC PHEDRAN V. LUSHER.

A plea of a foreign judgment, pleaded *puis darrein continuance*, must show that the cause arose since the last continuance and that the judgment was on the merits, and conclusive between the parties in the court or country where it was given, or the plea will be bad; and semble, such a judgment properly pleaded would be a bar.

Assumpsit for work and labour and the common counts. The defendant pleaded *puis darrein continuance action non*, because plaintiff, on the 10th December, 1831, in the Supreme Court of Judicature of the People of the State of New York, the said court then and there having jurisdiction of the said matter, impleaded the defendant for the non-performing the very same identical promises and undertakings, in the said declaration mentioned; and such proceedings were thereupon had in the said court, in that plea, that afterwards, to wit, on the 2nd day of August, in the year of our Lord 1833, by the consideration and judgment of the said court, the said plaintiff took nothing by his said bill, but the said defendant recovered against the said plaintiff his costs and charges by him incurred about his defence; whereof the plaintiff was convicted, as by the record and proceedings still remaining, &c., more fully and at large appears. Which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void, *et hoc par. est ver.* General demurrer, and joinder in demurrer.

Smith argued in support of the demurrer: 1st. That a foreign judgment was no bar. 2ndly. That this judgment did not appear to have been on the merits. *Draper*, contra, insisted that, until avoided, this was a bar, though it perhaps could not be pleaded as an estoppel.; that any objection to form could not be raised on this general demurrer.

ROBINSON, C. J., was of opinion that the plea was bad. Without giving judgment now as to whether such a defence, if more fully pleaded, would bar the plaintiff, it is sufficient to say that this plea cannot be supported. For all that appears on the face of it, this judgment might have given, as in case of nonsuit, or by *non pros*, or in some other way, without the merits having come in question. It was not shewn that it was conclusive on the parties, even in the court or country where it was given. It is also defective in not shewing distinctly and conclusively, on the face of it, that the matter of defence arose since the last continuance; for it is not sufficient to say generally, that, after the last continuance, such a thing happened; but the day of the last continuance must be shewn, and the day when the matter of defence arose must also be stated.

MACAULAY, J.—It may fairly be inferred from all the cases, that a foreign judgment had in a court of competent jurisdiction is conclusive upon the parties *inter se prima facie*, subject to be drawn in question by the party sought to be charged or estopped by such judgment. They seem to possess a validity equivalent at least to a promissory note, or a receipt in full. They afford sufficient foundation for an action of debt or assumpsit in favour of creditors obtaining them, and ought to be equally available in favour of a defendant. In the plaintiff's case, they are regarded as more than mere evidence of a debt, for they are declared on as upon awards, promissory notes, &c. They import or constitute in themselves sufficient consideration or evidence thereof to raise an implied promise. In other words, they clothe the plaintiff with a *prima facie* right of action thereon, and are so far *per se* conclusive upon the defendant. The latter may shew a want of jurisdiction, fraud, injustice, or irregularity in the recovery; but until assailed by him, they

are conclusive and sufficient ground of action. Being more than evidence in favour of the plaintiff, namely, the substratum of an action of debt or assumpsit, conclusive upon the defendant until impeached, they would by analogy seem more than evidence in favour of a defendant when sued a second time, and pleadable in bar, though requiring perhaps more technical precision than when declared upon; and conclusive upon the plaintiff until avoided by him, upon grounds dehors the record, or apparent upon the face thereof. Yet they do not merge or change the nature of the original demand; a remark equally applicable, however, to negotiable securities, awards under parol submissions, and other proceedings that might be named. Upon the whole, though I incline to deem such foreign judgments conclusive *prima facie*, subject to be impugned on the other side, and pleadable in bar when rendered for the defendant upon the merits, by a tribunal possessing jurisdiction over the parties and the subject matter, and the judgments of which are conclusive within the foreign jurisdiction, I abstain from expressing any fixed opinion upon this point at present. Before doing so, I should require more time for consideration, feeling the arguments and authorities weighty in favour of either conclusion, and some cases strongly tending to deny to foreign judgments and validity beyond mere written evidence of a demand or acquittance, such as written acknowledgments of debts, or receipts admitting payments, which, though conclusive as evidence *prima facie*, cannot be declared on and are not pleaded as estoppels, but simply evidence, open to explanation or contradiction, and liable to be defeated by proof of mistake, fraud, and the like. My present impressions are strengthened by the course observed in England touching inferior courts, at least those of record. Actions lie upon these judgments, and they are pleadable in bar, subject in either case to be evaded by sufficient matter disclosed by plea or replication.

The present plea seems insufficient upon two grounds, namely, the defective statement of the last continuance, and the want of any averment that the foreign judgment was conclusive between the parties as a bar, in the state of New York.

See Yel. 141; Cro. Jac. 261; 1 Freem. 112; 3 Lutw. 1143; 2 Sal. 519; 2 Wil. 139; Bull, N. P. 309; Rast. Ent. 549; 4 B. & C. 627; 7 D. & R. 26, 37; 3 Ea. 348; Willes, 10; Carth. 66; 6 T. R. 62; Hob. 206; Cro. Jac. 284; 4 B. & C. 635; 2 Ea. 260; Willes, 37; Str. 1090; 5 T. R. 513; Bull, N. P. 162; 2 B. & A. 662; 3 Ea. 346; 1 Doug. 1; Hard. 118; 2 Vern. 540; 4 T. R. 593; 2 H Bl. 410; 5 Ea. 475; Burr. 1005; 9 Ea. 192; 1 Camp. 63, 255; 1 Stark. N. P. C. 525; 11 Ea. 121; 2 Bl. R. 1175 13 Ea. 440; 2 C. & P. 345; Cro. Jac. 284; 3 Bing, 353; 3 Wils. 297; 2 Bing. 215; 2 Camp. 19; Willes, 36; 3 Keble, 785; Hardw. 80; T. Ray. 473; Str. 773: 1 Ea. 437: 5 Ea. 475; 3 T. R. 639; 4 M. & S. 20; 7 B. & C. 394; 8 B. & C. 16; 3 B. & C. 87; 2 M. & R. 153; 1 D. & R. 35; 1 D. & L. 38, 81; 1 Vez. 159; 8 T. & R. 192, 230; Co. Lit. 303 b.; Co. Lit. 352 a.; 4 Co 53. a; 11 Co. 52; Hob. 206; Dal. 68; 1 Sand. 325 n. 4; 2 Sand. 190; 2 Lord Ray. 1051; 1 Sal. 277; 2 C. & P. 158.

Per Cur.—Judgment in favour of the demurer.

BUTLER v. RICHARDSON.

After a demand made and sworn to, the court made a rule for particulars of demand to be delivered and to stay proceedings in the mean time absolute in the first instance.

IN RE DENHAM AND THE CORPORATION OF THE CITY OF TORONTO.

The court will, if circumstances require it, issue a mandamus to a municipal corporation, to compel them to proceed in the trial of a contested election.

Mr. Denham and others, by *Spragge*, applied for a rule nisi for a mandamus to the Corporation of the City of Toronto, to proceed in the trial of a contested election for one of the wards of the city, upon affidavits representing that a delay of several months had taken place, and that the Common Council had declined hearing the parties or trying the question until their court should meet in August; and it was met by affidavits, produced by *Small*, stating little in substance, but that a time had been fixed for enter-

ing upon the trial at the then next ensuing sitting of the court of Common Council. *Draper*, in support of the application, contended that the delay was unreasonable and amounted to a denial of justice ; for unless this court interfered, the period for which the alderman were elected would more than half expire before the trial took place as to who was entitled to the seat.

ROBINSON, C. J.—There is no doubt that the corporation should be prompt to try any question which effects the constitution of their body. In every such case, the trial should take place within a reasonable time. Here there certainly is no reason given, why the petitions complaining of the undue return of the sitting alderman have not been considered, or why the investigation should have been delayed so long. It is both the right and duty of this court to compel corporations to do what is right, or to redress what is wrong ; and this court could have no hesitation in superintending the proceedings of this corporation upon every reasonable complaint made, and of issuing the proper writ to enforce obedience.

The act of the legislature incorporating the city of Toronto is their only charter: all their authority springs from it, all their duties arise under it. The duty of trying a contested election of one of the common council is clearly imposed: and a reference to the 18th, 23rd, 27th, and 33rd clauses of the act shows clearly what the qualifications of electors and candidates are, and their nature is such as to be easily susceptible of trial. There can be no difficulty in any such question, which requires any great delay. As the common council are the only tribunal appointed for such trials, if they fail to discharge that duty this court can give redress. In this particular case there is a failure, to the moral conviction of any person. Their proceedings have not been as prompt as they ought to have been. But they have not refused to try, nor to fix a time for trial. Although they might have disposed of the matter much earlier, still the act prescribes no specific time within which the trial shall take place. If this court were to grant the rule, it could only be returnable on the first day of next term.

Before that arrives the period fixed for the trial will happen, and we may fairly suppose the matter will be disposed of. The rule will then be useless. The parties who make this application have been remiss in not praying for the interference of the court, before a period when there is no good reason to suppose any good can result from it. On the whole, I think the rule should not go.

MACAULAY, J., concurred in declining the rule, and expressed in substance that, as it now appeared a day in August had been appointed for proceeding with the business, no expedition could be expected from a mandamus, which, if granted, could not be returnable till November. That there was no doubt in his mind touching the jurisdiction of this court to interfere by mandamus with the corporation of the city of Toronto, or any other similar public institution, or other inferior court, under such circumstances as would authorize a similar intervention of the court of King's Bench in England; and that an ordinary use of that writ was to compel municipal corporations to exercise their functions, and to conform to and discharge their fixed duties when prejudicially refused or omitted, and even to quicken their diligence in the event of unreasonable and inexcusable delay, when any duties expressly enjoined in or incidental to their constitutions, or imposed by lawful authority, are neglected, however their discharge might in the first instance be discretionary in point of time. That he had therefore no doubt of the propriety of a mandamus to compel the common council of this city to proceed in the trial and disposal of contested elections of corporate members, if refused or unreasonably delayed. That in the present case, the past delays had not been accounted for to his satisfaction; but as the application was to provide for the future, and not to enquire of the past, except only with that view, it became of less moment to form an opinion upon that head, if there was reason to suppose that no just cause of complaint would be suffered to subsist hereafter. That in England, the qualifications and elections of corporate members, and many other corporate rights and privileges, were usually tried upon informations in the nature of a *quo war-*

ranto, so that a case like the present could not well arise there; and in most of the numerous cases in which the writ of mandamus has been resorted to, a positive refusal, or a long neglect and delay tantamount to a refusal, have appeared, or fixed periods have been suffered to elapse without the observance of prescribed duties appointed to be then performed. That the difficulty here was that, by the 41st section of the act of incorporation, it is provided, in brief but comprehensive terms, that "the common council shall determine the rules of its proceedings, and judge of the qualifications, elections and returns of its members." The power and discretion being vested in the council, the proceeding by information is superseded; and this court can at no time further interpose than to compel that body, when necessary, to exercise with reasonable diligence its jurisdiction in the premises, upon such occasions as may demand it. In carrying this clause of the act into effect, it seems to me the council should, as early as convenient, adopt fixed rules for its guidance and government in the reception, hearing and disposing of all formal petitions, in which the qualification, election, or return of any of their members, may be impugned. The corporation is yet in its infancy, and delays and difficulties may be expected to occur in the first year of its existence that will not arise afterwards. When general and uniform rules of proceeding for the government of all cases shall be determined by by-laws and provisions to be made by the act of the common council, for a registry of votes, as contemplated in the act, facilities for the trial of contested elections and returns, will be afforded that do not at present subsist, and there will be the less cause for any unusual delays in coming to final decisions upon all proper applications questioning the right to corporate seats; or if complained of, this court will be the more able clearly to perceive how far it may become their duty to grant redress by the prerogative writ of mandamus, for any illegal breach or neglect of duty. As the superintending power of this court is to be exercised with discretion, the foregoing considerations are not to be overlooked on this occasion, in itself somewhat novel, and one

entitled therefore to the more deliberate circumspection. If this statute, instead of leaving the adoption of rules to the discretion of the common council, had presented them with fixed periods for their observance, a neglect or disobedience of them could be more readily manifested, and the propriety of this court's interfering by a mandatory process be more satisfactorily ascertained; but as it is, a great discretion is reposed in the council, and at best (in the absence of by-laws for such investigations) it must, where no absolute refusal takes place, be matter of opinion what is due diligence, or what constitutes unwarrantable neglect or delay, a question on which different sentiments may be entertained by the council on the one hand and this court on the other. This court being of paramount authority has of course the right to decide and control in such emergency; but when it is remembered that under the 41st section, already noticed, much latitude is given to the inferior tribunal, and that its members may have entertained the impression that, by reason of such discretion, it was open to them to consult their own convenience, without restraint, in disposing of the matter in question; and as it now appears that there is no absolute denial of justice, but that, however late, a day does stand appointed for the consideration of the subject, earlier in point of date than a mandamus nisi (which by analogy to adjudged cases in England would I think assign no particular day) could be returnable, I deem it better to leave the matter to take its course in the common council, without at this moment resorting to a mandate, to which it might be hereafter answered with truth that the case was in due order determined at the period which this court was apprized stood fixed for such purpose before the granting the mandamus. He was not disposed at present to doubt or question the *bona fides* of the common council in the future stages of the business; and it was in the confident expectation that no future delays, not unavoidable, will be suffered, and that the right to the disputed seats will at all events be finally set at rest before next term, that he concurred in abstaining from the present award of the writ moved for. Should however the exigencies

cies of the case require it, the application can be renewed next term.

Per Cur.—Rule discharged.

LEONARD AT SUIT OF THOMPSON.

The court decided that a defendant, in whose favour a verdict is rendered, is entitled under the equity of the King's Bench Act 2 Geo. IV. ch. 1, to a *ca. sa.* for the costs of his defence.—*Smader v. Johnson*, 1 Taylor, 174.

Spragge for plaintiff. *Draper* for defendant.

MR. JUSTICE SHERWOOD did not take his seat on the Bench during this term, from indisposition.

In this term, the following gentlemen were called to the bar and sworn in.

JOHN RICHARDSON FORSYTH, CHRISTOPHER ARMSTRONG,
ORMOND JONES, JAMES SMITH, Esquires.

JNO. B. ROBINSON, C. J.
J. B. MACAULAY, J.

KING'S BENCH.

MICHAELMAS TERM, 5 WILLIAM IV.

ELLIS v. GRUBB.

Mere notice of the execution of a previous deed for the sale of growing timber will not defeat the operation of a subsequent conveyance of the land, if the latter be registered first.

Growing timber is so far real estate that, to be severed from the inheritance by deed or devise, the conveyance or will must be duly enregistered to pass the interest intended to be conveyed.

Case for cutting timber.

One Lewen, being proprietor of a lot of land in Etobicoke, executed a deed on the 27th October, 1832, whereby he sold all the pine timber growing upon the lot, to the plaintiff Ellis. This deed was enregistered in the county registry, but not until the 28th August, 1833. In the mean time, Lewen (on the 19th February, 1833), executed a deed of bargain and sale of the land to Thorne, without any exemption of the timber, and containing the usual words expressly granting the woods, underwoods, &c. This deed was registered in the county registry, on the 13th April, 1833. By deed, dated 7th August, 1833, Thorne conveyed the land in like manner to Grubb, who registered his deed on the 29th August, 1833. Grubb, as the purchaser and proprietor of the land, cut down a considerable quantity of the growing pine timber; and Ellis in this action sought to recover damages against him, claiming the timber as his, under his purchase by the deed of the 27th October, 1832. At the trial, the objection was taken that his purchase of the growing timber was defeated by the prior registry of the subsequent sale of the land to Thorne; which objection was met by contending that a sale of growing timber is not such a conveyance as comes within the scope of our Registry Act. And it was further urged, that, even if it did, Grubb had notice, when he purchased, that the timber had been conveyed to Ellis, and could not therefore conscientiously claim an interest in it under his subsequent purchase. The jury expressed their conviction that Grubb had notice when

he purchased that the pine timber had been sold to Ellis; and they found a verdict for the plaintiff, 9*l.* 10*s.* damages. Leave was reserved to the defendant to move for a nonsuit upon the objection taken at the trial; and a rule having been obtained in Easter Term, and the case since argued by *Sullivan* for plaintiff and *Ridout* for defendant, the court took time to consider, and this term expressed their opinion that the objection must prevail.

ROBINSON, C. J.—With respect to notice, the question of fact was not properly whether Grubb had notice, because his deed was not registered until the 29th of August, the day after the sale of the timber was registered, and could not therefore have prevailed to defeat it. It is the prior registry of the conveyance from Lewen to Thorne which gives ground for the objection; and if notice were material the enquiry would be whether Thorne, when he took the conveyance, had notice of the prior sale of the trees to Ellis. As to the fact of his having notice, there can be no room for doubt from the evidence; but we have already stated our opinion that the fact of notice of a prior enregistered deed cannot, in a court of law, be allowed to prevent the application of the Registry Act. That point is firmly settled in England in reference to registry acts, which are substantially the same as ours, and it has been already expressly decided in this court. The only question therefore to be considered is the principal one, whether a conveyance of growing trees is within the Registry Act. There appears to be no case decided upon this point in England. Perhaps it has never seemed to admit of a doubt that a conveyance of this description does require registry, and therefore the question has not been raised. In considering the point, it is well to refer to the title of our Registry Act 35 Geo. III. ch. 5, and to the 1st, 2nd, 5th, 11th and 12th clauses, from which it will appear I think clear, in the first place, that if a conveyance of growing timber comes within the general scope of the act, it certainly does not come within any express exception exempting it from the operation of the general words used. Then, as to its coming within the general intent and purview of the act, the act renders it

necessary for a purchaser, mortgagee, &c., who desires security, to register "a memorial of any *conveyance*, whether by deed or other *instrument*, or concerning or whereby any lands, tenements, or hereditaments, may be in *anywise affected in law or equity*;" or, as in another part of the act it is expressed, "may be *anyway affected or changed*;" or, as in another part, "which *anywise affects or concerns* the lands, tenements, or hereditaments." Now, as to growing timber, it is clear that in general it is real estate—not a chattel. Until it has been *severed* from the inheritance it forms part and parcel of the freehold, and is included within each of the terms used in the statute, "*lands tenements and hereditaments*." It may be served, first, actually and visibly, that is, it may be cut down and so severed from the soil, in which case it becomes a chattel, and would not descend to the heir, or accompany the estate as part of the inheritance; or, secondly, it may be severed from the inheritance by being expressly alienated to some other person by the owner of the estate, in which case it is as effectually severed and made a chattel in contemplation of law, as if it had been actually felled and severed from the soil. After it has been severed from the freehold, in either manner, there is no doubt that thenceforward it may be sold with as little formality as any other chattel, and being simply personal estate, and no longer regarded as part of the land, if it be conveyed by deed or writing, which it need not be, nevertheless such deed or writing will not be the object of our Registry Act; and therefore the purchaser under a subsequent instrument could gain no title, by prior registry, over an antecedent purchaser from the same party, because there would be no obligation on the first purchaser to register an instrument for such purpose. It is clear, therefore, that if this sale of the timber to Ellis had not been defeated by the prior registry of the deed to Thorne, and had taken effect, from that time the growing timber could have been sold from hand to hand as a chattel, and the Registry Act could not have applied to any of these successive transfers. It may seem at first sight to follow in reason from this, that the Registry Act ought not to apply to this first sale; because

if no subsequent assignment of the timber need be registered, then the county registry will not afford information of the state of the title to the timber, and so the object of the registry will fail. From whence it may be objected, that it would be insensible to deprive Ellis of the benefit of his transfer because he has not placed it upon record, when, at the same time, it is admitted that it will not be necessary to continue the information further as to any future transfers. But it must be remembered that when Thorne, setting notice out of view, made his purchase of the estate, he saw on the registry no deed affecting the land, by separating the growing timber from it, and therefore would have a right to conclude that none such had been executed, and that in purchasing he would be secure of having all that forms a part of the freehold according to the general principles of law. If, however, he or any subsequent purchaser under him had found recorded a prior instrument, conveying away the growing timber, and thus converting it into chattels, he would have fair notice given him by such registry, that in purchasing the land he would take it without timber; and if the object was to trace the title to the timber in particular, the registry would convey information so far as to apprise the parties that they must thenceforth trace the title to it, as to any other chattel, and would not be safe in regarding it as parcel of the inheritance. There is therefore a rational object in applying the Registry Act to the first transfer of growing timber—that which separates it from the freehold—though there should be no necessity for registering any subsequent assignment.

The decisions which have taken place in England upon the Statute of Frauds seem indeed to have disposed of this question; for if timber growing on an estate had not constituted any part of the “*lands, tenements, or hereditaments*,” or if a contract for the sale of it had not been “a contract for any interest *in* or *concerning them*,” it could not have been settled (as it now is) that a sale of such timber, or a contract for the sale of it, comes within the 3rd and 4th sections of the Statute of Frauds. Then, if a sale of growing timber is admitted to be a sale of “*lands, tenements*

or hereditaments," or a sale of "an interest *in* or concerning them," we cannot deny that a conveyance for effecting such a sale does "*affect* or *concern* the lands, &c.," and most clearly, if it does "*affect* or *conceru* the lands," it comes expressly within our Registry Act. Again, the 5th section of the Statute of Frauds, which relates to wills, is in these words: "That all devises and bequests of *any lands or tenements, &c.*, shall be in writing, and signed by the party devising the same, &c., and shall be attested and subscribed by three or four credible witnesses, or else they shall be utterly void and of none effect." Now it is held that, since this statute, a devise of "*growing trees*" must be attested by three witnesses, and executed in all respects as a devise of land, or it will be void. This goes the length of determining that growing trees are included in the terms lands or tenements; and, consistently with this idea, it cannot be determined that a conveyance of growing trees does not come within the terms of an instrument "conveying lands, tenements, or *hereditaments*, or which any way affects or concerns them." If in this province a testator desires to devise his growing trees, we must hold, in accordance with the English law, that he must do so by a will attested by three witnesses; the effect of which decision would be to affirm that we look upon them as a parcel of the lands and tenements. Supposing then such a will were made and in judgment before us, and that an opposing claim were set up to the trees by a purchaser from the heir, relying on the failure of the devisee to register the will within six months —the period limited by the statute—could we hold that the sale by the heir did not gain preference by his prior registry (after six months has expired), and upon the principle that our Registry Act has no application to a conveyance of growing timber? If we were to hold so, we must hold at one moment that growing trees *were* "lands or tenements," and, as such, within the 5th section of the Statute of Frauds, and, at another moment, that they were "neither lands, tenements, nor *hereditaments*," and therefore not within our Registry Act.

It is held, indeed, that a bargain and sale of growing

timber need not be enrolled—Liford's case, 11 Co. 48—and it may seem that this is not consistent with the doctrine held in regard to the application of the Statute of Frauds; but there is a plain reason for the distinction. The words of the Statute of Enrolments, 27 Hen. VIII. ch. 16, are that “no manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another, whereby any estate of *inheritance* or *freehold* shall be made, or take effect, in any person or persons, or any use thereof to be made by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing, indented and enrolled in one of the King's courts of record at Westminster,” &c. Now it is not the intention or effect of a sale of growing trees, that any estate of inheritance or freehold shall take effect in the vendee; and therefore this provision does not apply to it. The effect is merely to divest the freehold interest which the grantor had in them as long as they were held with the estate; but the conveyance of the trees does not pass a freehold interest to the grantee. On the contrary, he takes them, by the mere act of severance, as a chattel, and holds them as such. The statute, therefore, in saying that he shall take no freehold without enrolling the deed, cannot prejudice him when he takes by bargain and sale of the trees, separate and apart from the land, because he would and could hold all that such a conveyance could in the nature of things transmit, namely, the interest in a mere chattel. If that statute had, like our Registry Act, required the enrolment of all conveyances that could affect the lands, tenements, &c., then it must have received the same construction, and, as a deed converted the trees or parcel of the freehold into chattels would certainly have concerned and affected the freehold, it would have been necessary to enrol it. On the whole, I am of opinion that this conveyance of the growing timber requires registry, to secure it against the contingency of being defeated by the prior registry of a subsequent conveyance of the land on which the timber was growing; and that the registry of the deed to Thorne does defeat it, and that therefore this objection to Ellis recovering must prevail, though it certainly is

against justice, for Throne knew of the purchase Ellis had made ; and Grubb, besides other notice of it, had, before he bought the land, the notice given him by the prior registry of the sale to Ellis—that is prior, I mean, to the registry of the deed under which he took, though, unfortunately, not prior to the registry of the deed to Thorne. We all agree that a nonsuit must be entered.

SHERWOOD, J., declined giving judgment, having been absent last term.

MACAULAY, J.—Timber, until severed, attaches to the land and forms part of the estate; and though when sold separately it is in fiction of law converted into a chattel, yet it is not usually so regarded until actually separated. And notwithstanding it has been said a sale thereof may be verbal, and needs not a writing within the Statute of Frauds, yet later authorities establish that a transfer of growing trees constitutes a sale of an interest in or concerning lands, tenements, or hereditaments, within such statute ; and it seems to be assumed that a will of timber would be inoperative, unless attested, &c., according to the statute in that behalf. The Register Act requires all deeds or conveyances of *or concerning* and *whereby*, &c., to be registered. The present is a deed and a conveyance of standing timber, and it is difficult to say that it is not *concerning* and *whereby* lands, tenements, or hereditaments, are affected. The terms, scope and object of the act, are sufficiently comprehensive to include such transfer ; and though to be regarded as chattels thenceforward, the trees should be so converted by a conveyance, effectual to alienate a portion of the heritable freehold, which they were till effectually severed in fact or construction of law.

See 11 Co. 47, 83 ; 4 Co. 63 ; 12 East. 210 ; 15 Ves. 425 ; 3 Mod. 519 ; 3 Swan. 145 ; Owen, 49 ; 1 T. R. 55 ; Cro. Car. 243 ; 2 And. 51 ; 8 Co. 137 ; 11 Co. 50 ; Latch, 163 ; Perkins, 58-9 ; Hob. 168, 173 ; 1 T. R. 55 ; 12 East. 210 ; 15 Ves. 426 ; 3 Mod. 519 ; 3 Levan. 145 ; 1 Eq. Ca. Ab. 221, 400 ; Stat. 11 H. VII. ch. 20, 1 cl. ; Tilt's Waste and Tenant in tail ; 2 Ves. sen. 413 ; Plowd. 25 a. ; 1 Mod. 113, 121 ; 1 Lord Ray. 182 ; Williams' Law of Executors, 450-1 ; 6 East.

602; 2 East. 88; 1 Y. & J. 396; 4 M. & R. 455; 9 B. & C. 561; Roberts, 109, 126; 3 B. & C. 364-8; 5 D. & R. 231; 5 B. & C. 839, 142; 2 B. & A. 225; 6 B. & A. 233; 1 Leg. Ab. 302, S. C.; 6 Moore, 114; 2 B. & C. 142; Roberts on Wills, 99, 100; Perkins, 544; Plow. 10; Page, 190; 2 Bing. 207; 5 Bing. 49; Roberts on Statute of Frauds, 126, 364; Stat. 35 Geo. III. ch. 5; 29 Ca. II. c. 3, s. 4; Plow. 25 a.: 1 T. R. 55; 12 East. 210; 15 Ves. 425; 3 Mod. 5, 19; 2 Swan. 145; 1 Eq. Ca. Ab. 221, 400; Stat, 11 H. VII. ch. 20; Cro. El. 413; 2 Lev. 159; Pl. 192; 7 E. 200; Ham. N. P. 139; 3 P. W. 257; 3 Wils. 444; Rob. 555; 5 E. 485; 2 Car. 484; Co. Lit. 6.

Per Cur.—Rule absolute.

McGILL ET AL. EXECUTORS OF MEARS V. BELL AND BELL.
An executor suing for a cause of action arising after the death of his testator, must, under the general issue produce the probate of the will—but where on the general issue pleaded to a declaration containing counts, for a cause of action in the time of the testator, as well as since his death, both causes of action were proved, but no probate was produced, it was held that the production was unnecessary, as it appeared on the record, from a verdict being found for a cause of action in the time of the testator, that the plaintiffs were executors.

Assumpsit for freight. The declaration contained several counts; some for causes of action accruing to the life time of the testator, and others for demands accruing to the executors, as such, after his death, with promises to them as executors; one of each set of counts being for freight for the carriage of goods. Profert was made of the letters testamentary at the end of the declaration, and the defendants jointly pleaded the general issue—non-assumpsit *modo et forma*—to the whole. The evidence at the trial, at the Bathurst assizes, in 1833, before Mr. Justice Macauley, proved that the defendants were indebted to the testator in his lifetime in the sum of 4*l.* 1*s.* 3*d.*, for freight carried by a steam-vessel of his; and that after his death the same vessel, then belonging to his estate, earned 25*l.* 5*s.* 6*d.*, for other freight, which was recoverable from the defendants by his legal representatives. A verdict was rendered for the plaintiffs for both sums, subject to be reduced to 4*l.* 1*s.*

should the court be of opinion that it was incumbent upon the plaintiffs to have produced the probate to prove their special character in support of their demand for freight earned during their own time. The case was argued in Trinity Term, by *Spragge* for plaintiffs and *Draper* for defendants, and the court this day gave judgment as follows.

ROBINSON, C. J.—Upon the argument of this case last term, it appeared to me to be clear and free from doubt, and I did not see upon what ground the plaintiffs' right to recover upon the evidence given could be resisted, in respect to the second count, any more than the first. But I had not then heard the notes of the evidence read; and from the general statement of the trial, I assumed the facts to be such as one would naturally expect to find them in a case of this description. But I was in error, and the point raised on argument is not to be disposed of as I concluded it must be. I took it for granted that after Mears died, his executors, the plaintiffs, had taken possession of the vessel which earned this freight, in common with the other goods of their testator, and that while she was visibly in their employment the defendants had employed them to transport their goods, or had bargained with a master, who accounted to them for the proceeds of the boat, or who was otherwise shewn to be their servant. In such a case there would have been no doubt that the plaintiffs could have recovered without proving themselves executors, although they have declared as such. The contract would have been one made expressly with them after their testator's death, and the promise would have been implied upon the service rendered. In the case of *Brassington v. Alt*, 2 Bing. 177, three executors out of four had sold to the defendant certain goods of their testator, and they brought their action for the price, without joining the fourth executor and without declaring as executors; and it was held they might, because the contract was directly with themselves. The four might, if they pleased, have sued as executors; and if they had, and had set out their cause of action truly, namely, for goods sold by them which they had as executors, the defendant could not have pleaded *ne unques executor*, nor need they have proved their

representative character ; because they were clearly entitled, at any rate, to recover of the defendant the value of the goods. But it seems, in the case before us, the facts were rather peculiar. Mears, the former owner of the boat, had died not long before. While he was living, the boat earned from the defendants the freight for which the executors declare in their first count, and for which they have recovered a verdict ; and at his death, the boat continued to be navigated by the same master, who kept an account for the benefit of the persons entitled, whoever they might be. But it did not appear that even *he* knew who were the representatives of Mears. No actual acknowledged privity of master and servant was shewn to have existed between them, and there was no apparent change of circumstances, except the mere death of Mears, between the earning of the freight stated in the first count and that in the second. So that the defendants, when their last freight was carried, were not shewn to have done any thing, or to have been conscious of any thing ; from whence it could be truly said that they were knowingly dealing with the present plaintiffs. They simply put their goods to be carried in a boat, which had once been Mears', and which was now navigated by the same master whom Mears had employed. Upon this statement, I confess I can see no sensible ground on which to distinguish this case from that of Hunt v. Stephens, 3 Taunton, 113. There a horse, which had been owned by the intestate, was converted by the defendant in the time of the administrator ; and the case, so far as it is authority, determines, first, that upon such a cause of action the administrator might, to be sure, bring trover in his own name, because, as he was entitled to the exclusive property in these goods and was the legal owner, although in his representative character, the conversion was a wrong done to him. So here—if these plaintiffs be really the executors of Mears—the freight earned by this boat after his death created a demand due to them, for which they were entitled to sue in their own name, and, whether they chose to do so in fact, or to sue as executors, the amount recovered would equally be assets, for which they would be accountable in

their representative capacity ; and secondly, in the case in Taunton, it is ruled that although, when the horse was converted, it was not in the actual possessor of the administrator, and never had been, he might nevertheless bring trover in his own name, because the conversion was in his time ; and upon this principle, that when he shewed himself to be administrator of the deceased owner of the horse, he shewed himself to be the legal owner ; that the property draws after it the constructive possession, and consequently the horse could be truly said in contemplation of law to have been lost while in his *possession*. But it was held that, as this rests wholly on the inference from the representative character, you must give evidence that the representative character exists, or you have no ground on which to rest the inference ; because the horse, never having been in the actual possession of the administrator, was not, in point of fact, taken out of his possession. All depends upon the property ; and as the only mode by which it was proposed to prove either possession or property was by advancing the bare fact that the plaintiff was administrator, that fact must of necessity be shewn, or in reality nothing would be shewn. In applying this case to the facts before us, the defendants here entered into no personal contract with the plaintiffs for carrying their goods, they did not directly employ them ; all that can be said is, they availed themselves of the services of a vessel which belonged to Mears at his death. That vessel, at his death, became the property of his executors, and any person, consequently, who under those circumstances sent his goods to be carried in it came under an implied contract to pay the executors for the service. That is a contract implied by the law from the bare fact that the executors were the owners of the boat, and as such had a right to what she earned. But in such a case as in that of Evans v. Mann; Cowper, 569, it is necessary, before you can claim the benefit of the implication or inference, to establish the fact that is to support the inference. If the plaintiffs are executors of Mears, they have a right to this action. Unless they were, there is positively nothing in the evidence given at the trial to support

a claim on their part to recover. So far I admit the arguments of the defendants, and to that extent I think they are right; though, before reading the notes of the evidence, I concluded that even to this extent they could not support their objection, for I naturally imagined that, when the goods referred to in the second count were carried, the vessel was in the actual possession of the plaintiffs, and used by them or their servants.

But after this point is cleared up, a further consideration presents itself, and, upon the whole case as it stands, it still appears to me, as it did in the last term, that the defendants could not at the trial object to the plaintiff's right to recover on the second count, on the ground that they had not given actual proof that they were executors. My opinion is that the plaintiffs have a right to the postea upon both counts, although they gave no evidence of their representative character. From the comparison instituted between this case and that of Hunt v. Stevens—supposing the comparison to be just, and the one case to be properly decisive of the other—it will clearly follow, that if the declaration in this case had contained only the count upon which this question arises, the proof of executorship would have been indispensable. But on this record we see that the plaintiffs, suing as executors of Mears, have recovered. We also see that they have recovered rightly, and according to the evidence, part of the demand for which they have brought their action as executors; and, that being so, it is manifest to me that we can never suffer them to be defeated in recovering a further sum claimed in this same action, merely because they have failed to *prove* that they are executors of Mears, and for no other reason. To a general intent, it is true that different counts are to be regarded as different and distinct declarations, so that what is admitted by the defendant in the pleadings upon one count cannot be taken against him to supply the evidence that would otherwise be necessary to support the action upon another count. But I think the defendants here attempt to push that principle too far, and to an extent indeed that would lead to inconsistencies and repugnancies upon the records of this court;

making one part of the record in an action falsify another, and that in a matter that concerns the identity or individuality of the parties suing or defending. I admit that it is usual for a plaintiff, suing, for instance, upon a written agreement, to state his action in various shapes in several counts, sometimes when he claims in all of them upon one and the same breach, sometimes when he claims upon what are substantially different breaches. It is usual also for him, in thus declaring, to treat the agreement in each count as a different agreement, that is, as a different and distinct instrument; and clearly, when he does so, however distinctly the defendant, in pleading to one count, may admit the execution of the instrument mentioned in that count—relying upon some special defence—such admittance cannot be transferred by the plaintiff to any other court, in the pleadings to which the execution of the instrument is denied, and for this reason, that whatever the fact may be, the plaintiff has declared in each count as upon a separate instrument, and the defendant replies as in reference to so many separate instruments; and there is therefore no repugnance in saying that, upon the record, the execution of the instrument set forth in one count stands admitted, while that in the other is denied; and the judgment in his favour upon one count, where he had admitted the instrument, would present no repugnancy to a judgment against him on another count, upon the express ground that the instrument there spoken of was not executed by him, because the instruments do not appear to be identical, but, on the contrary, they are expressly averred to be "other and different," and the defendant may well be found to have executed the one, and not to have executed the other. But if a plaintiff should so frame his declaration as to state unequivocally that he refers in every count to one and the same instrument, claiming in one count for one breach, in another count for another breach of *the same instrument*; or, in one count, averring performance of a condition precedent, which in another he chooses rather from prudence to omit; then I do not feel satisfied in concluding that, if the defendant in pleading to one count were to admit the execution of the

instrument, it would still remain necessary for the plaintiff to prove the execution, before he could recover upon it under another count in the pleading to which it was not admitted. In reason, such proofs would not be necessary, and I think it would not be required by the rules of evidence and pleading. But this case is stronger than that which I have just supposed. The plaintiffs bring their action for the *whole* of their demands, *as the executors of Mears*. They begin their declaration in that character; and opening their case from the record before the jury at the trial, I consider them as saying, "We, as the executors of Mears, make a demand upon the defendant for several causes of action which we have as executors, and, in the first place, we claim for freight due to Mears while he lived. What have you, the defendants, to object to our claim? You cannot say here that we are not executors, or require us to prove it, because being made fully aware by the statement of this part of our demand that we were suing you upon no contract made with ourselves, but upon a contract made with Mears, you knew we could shew no right to recover unless we were prepared to prove ourselves executors; and if you did not know this, or doubted this, you might and therefore should have denied it, and required of us to prove it. But you have not done this. You have, on the contrary, acquiesced in our statement that we are executors of Mears, and have refused to pay us, because, as you allege, you owe nothing to Mears. This is therefore the only matter disputed between us. Your promising or not promising to pay money to Mears, would be wholly immaterial in this action, unless we, as his representatives, have a right to sue upon that promise; and since you do not object to our right, but simply deny your debt to Mears, we shall take it for granted that our representative character is admitted by you, and that we have only to prove the debt to Mears, which alone you have denied, and this we shall now do." The plaintiffs now prove this debt, by shewing that in Mears's life time the defendant's goods were transported in a vessel of his, and, the court and jury assenting, they are held to have proved their case upon the first count, and recover 4*l.* 1*s.* 3*d.*,

They then proceed to state: "This is not *all* the demand which we, as executors of Mears, have against you; we sue you upon this further cause of action. After Mears died, your goods were continued to be transported in *his* vessel, or the vessel that was his at his death; and for this cause of action, we, the same executors who recovered against you for the debt due to Mears in his lifetime, demand payment of you as of a debt contracted with us, his executors, since his decease. We prove the account for freight. What have you to say why you should not pay us?" Can the defendants reply: "You have not proved that you are the executors of Mears?" I think not. To such an objection the plaintiffs might reply: "That is already established between us on this record, and in this action. We have sued you in this action as the executors of Mears. We are either his executors or we are not. If we are not, we have most clearly no right to recover against you for freight due to Mears; but that we have just done by the verdict of this very jury, and with the approbation of the court; not because we proved it, but because you relieved us from the necessity of proving it, by admitting on the record that we have a right to bring this very action as Mears' executors. Now although, as the executors of Mears, we might in one action bring various separate and distinct demands against you in different counts, and, if we did so, must prove each separate demand independently of the others, yet when we sue as executors we sue in that capacity in all the counts. It cannot be pretended that the plaintiffs in the first count are not the plaintiffs in the second; and therefore, as we cannot possibly be at the same time the executors of Mears and not the executors of Mears, when we have once established the capacity in which we sue, so as to enable us to recover against you in that capacity for one of our demands, that part of our case can no longer be questioned as to the other part of our demand. The fact of our being executors must be one and the same in reference to the whole action, and it is needless to prove the same fact twice upon the same trial. As to the first count, it stands admitted, because not denied; and being

admitted, it is precisely as if we had proved it; and if at the trial we had proved it once, the fact would have stood as established in regard to the whole action, because it clearly and necessarily affects and applies to the right of suing as it respects the whole. We see therefore no more occasion," the plaintiffs might say, "to repeat the proof for the purpose of every count, than we should have to prove the execution of an instrument five or six times over on the same trial, because it is stated in five or six counts." An instrument being proved once, which will apply to all the counts, and the plaintiff not pretending to advance any other instrument, although he has sued as upon several distinct instruments, it is, from the apparent conviction that it is the one spoken of throughout the declaration, received as proved and applied to sustain the action upon all the counts indifferently. So here it is certain that there are but these same plaintiffs suing in each count; and if it is shewn or ascertained, by admission or otherwise, in any part of the record, or in any part of the evidence on the trial, that they really do stand in the capacity in which they sue, it does not remain to enquire which of these causes of action, brought in that capacity, they have succeeded in sustaining. The causes of action may be several, but the persons of the plaintiff's are the same in all.

But the argument is, that the counts are all separate and distinct, as much as if they were separate and distinct actions; and the pleadings upon one cannot be applied to or have any effect upon the pleadings upon either of the others. I admit the general principle, but there is an error in applying it, as attempted here. In the first place, looking at it with a view to pleading, I hold it not to be competent to a defendant, when sued by an executor, to pay money into court upon one count, or to plead a tender to one count, and to another to plead *ne unques* executor. Can it be possible that these defendants could have pleaded a set-off to the first count of a debt due by Mears to them, in which case they might recover against these plaintiffs, under our statute, a balance to be levied of them as executors, and to plead to the next count "*ne unques* executor?" If the defendants have allowed the plaintiffs to recover on the first

count, can they upon the second count put them to prove their executorship? If so, then of course they could in pleading have specially denied it, and a judgment could be sustained on the same record for the defendants on one count, on the issue that the plaintiffs are not executors; while, on the other count, the plaintiffs would have judgment as *executors* to recover against the same defendants. I consider that when the plaintiff sues an executor, for instance, as a surgeon, as the treasurer of a society, &c., if the defendant pays money into court, or pleads a tender or a set-off, or confesses the action upon one of the counts, he thereby admits the capacity in which the plaintiff sues, and leaves him only to prove what demands he has in that capacity, and that it is not competent to him to plead to the other counts, that he has *no* right to sue in that capacity. A defendant could not, in my opinion, plead *non est factum* to one count of the plaintiff's declaration upon a bond, and to another that he is an alien enemy.—10 E. R. 326. If this must be admitted to hold as regards the pleading, then I infer that it must equally hold as regards the evidence to be received at the trial, since the parties are only there to litigate what is at issue, not matters on which an issue cannot be raised—Buller's N. P. 298;—and if these defendants could not have pleaded *ne unques* executor to the second count, having acquiesced in the plaintiff's right to sue on the first, they could not, in my opinion, require them to prove on the trial that they are executors. If, to every intent and for all purposes, the different counts are to be treated as different actions, the principle would apply equally to defendants; and it would follow that a defendant, sued as executor, might to one count plead *plene administravit*, and to another *ne unques* executor, in which case the court at Nisi Prius, after investigating very patiently the defendant's accounts as executor, and recording a verdict in the plaintiff's favour as the result, might be called upon on the second count to try whether the defendant was ever executor, and possibly, from want of proper proof, must take on the same record a verdict in his favor; thereby establishing that he is not executor on one count, by the verdict of the

same jury who have found on the other count that, as executor, he has or has not fully administered the goods of the testator, I am of opinion, the postea should be awarded to the plaintiffs on both counts.

SHERWOOD, J., gave no opinion, having been absent at the argument.

MACAULAY, J.—Upon a declaration by an executor, laying causes of action exclusively in the time of the testator, the plaintiffs must make profert of the letters testamentary and the defendant cannot dispute the plaintiff's representative character, except by pleading *ne unques* executor.—2 Lord Ray. 824; 2 M. & S. 553; 4 Cam. 272; 5 B. & C. 481. On the other hand, where the causet of action are laid exclusively in the time of the executor, the plaintiff is not obliged to make profert, the defendant could not (safely) plead *ne unques* executor, and the special character is put in issue by the general issue, which goes to the foundation of the plaintiff's title, and negatives the promise or right of action as laid. The question then is, what effect the latter plea has when it is pleaded to the whole of a declaration containing counts of both descriptions.—7 Mod. 141; 1 Sal. 285; Holt. 44; Comb. 304, 451; 2 Saund. 47 a.; 1 Esp. N. P. 564; 3 Taunt. 113; 2 B. & C. 30; 3 D. & B. 200; 1 B. & C. 150; 2 D. & R. 271; 2 Ch. Pl. 182 s.; Roscoe Ev. 26, 379-80; Saund. Pl. 418; Com. Dig. Pl. 2 D. 1. I think, upon such a declaration, the plaintiff would be bound to make profert, entitling the defendant to oyer, and that the defendant could plead *ne unques* executor generally; and it seems to me a sound rule, that whenever the defendant may deny the special character by that plea, and omits doing so, he should be taken to have admitted it in the whole action. When a plaintiff blends counts, some of which he could sustain only as an executor, while, upon others, if separated, he might recover in his own right, I conceive this court would not, after a plea of *ne unques* executor to the whole, suffer the defendant to be embarrassed or the plea evaded, or the objection of misjoinder be obviated, by a *nolle prosequi*, or by the rejection as surplusage of any matter that might under other circumstances be

treated as redundant. The general issue to a double set of counts clearly admits to a partial extent the plaintiff's right to sue in the special character assumed; and by analogy to pleas of tender, or the payment of money into court as to part of the declaration, and upon the principle that judgment should be given according to the right appearing upon the whole record, I am disposed to think the plaintiff's right to sue in the special character admitted upon all the counts, and this, notwithstanding the inapplicability of admissions on one count, plea, or issue to another count, plea or issue, under the statute authorising several pleas, and the general rules of construction applied to civil pleadings. If so, it would be incumbent on the plaintiff to prove merely causes of action sustainable in the special character alleged. Though not without hesitation, I am therefore of opinion that, in this case, under the pleadings and evidence, the plaintiffs are entitled to judgment for the full amount of the verdict rendered.

See 1 Doug. 4 a.; 2 T. R. 126-8; Lord Ray. 12, 15; 3 Wil. 1; Hob. 38; Lord Ray. 635; 1 Vent. 119; Godb. 33-4; 3 Bing. 177; 1 C. & P. 303-4; Styles, 231, 282; 12 Mod. 443; 1 Sal. 37; 4 T. R. 277; 3 East. 110; 1 Sal. 314; 10 East. 293; 2 Taunt. 116; 9 B. & C. 666; 1 B. & Adol. 6, 893; Carth. 67; 1 Show. 60; 6 Mod. 134; 7 Mod. 15; 2 Saund. 9, 12, 72; Tidd. 1184; 1 Vent. 222; 4 & 5 C.; C. 16; 2 Ch. R. 697. 1 Ch. R. 16; 1 H. B. 108; 4 T. R. 347-8 360; 1 T. R. 40; 1 Sand. 207 e. 285; 1 B. & P. 157; 11 Mod. 196 v.; 5 B. & C. 491; 2 Sal. 487; 1 T. R. 149-50; Doug. 476; 1 Sand. 317 n. 2, 97 n. 1; Str. 1232; 2 Bl. 722; 3 Wil. 61, 141; Bur. 2417; 1 B. & P. 383 n. b.; 8 T. R. 416; 1 T. R. 276; 2 Saund. 217 e.; 5 B. & C. 491; 1 C. & P. 304 n.; 2 Sand. 172 e.; 3 Esp. N. P. C. 177; 5 Esp. 47; 4 East. 509; Sand. Pl. 418; 10 East. 326; 12 East. 206; 4 P. 38; 3 Wil. 145; 4 T. R. 194; 5 T. R. 97; 4 Taunt. 459; Lfft. 70; 1 T. R. 118, 24, 125-6; 6 B. & C. 224; 4 E. 508-9; Cro. Jac. 86; 5 Taunt. 228; Holt. 329; 6 Mod. 128; Lord Ray. 1034; 1 Sal. 213; 3 Sal. 14; 4 P. 38; 2 Cam. 441; 5 Eps. 19; Bull. N. P. 228; 1 Stark. Ev. 285; Arch. Pl. 225; Holt. 594; 4 Mod. 254; Sel. 218.

Per Cur.—Postea to the plaintiff.

ROWAND V. TYLER.

Even after verdict, this court will order a plea of release to be taken off the files, if shewn to be clearly fraudulent.

This was an application for the equitable interposition of the court, under the following circumstances.

In November, 1829, Rowand, the plaintiff, entered into an agreement with the defendant Tyler, under seal, by which Tyler covenanted "to demise, grant, and to farm let, for 99 years, by a good lease, to be given on or before the 1st January, 1831, all the water privileges, together with what land might be necessary for building a grist-mill capable of propelling two runs of stones, with other water privileges, and the necessary conveniences thereunto belonging; and also for the purpose of building an embankment for the use of such water privileges, so that the water should have 23 feet head and fall: the said premises being part of lot No. 80, on the west side of Yonge Street, in the 1st concession of King." And Rowand, on his part, agreed with Tyler to build, or cause to be built, on the said lot No. 80, a good and sufficient mill and dam, in two years after the 1st day of January ensuing the agreement, which would be after January, 1832. - Rowand also stipulated to give Tyler a bond, in 2000*l.* penalty, with sureties, to build the mill by the time mentioned; and for the true performance of the articles the parties bound themselves each to the other in 2000*l.* One Jacob Hollinshead became surety, with Hartman, to Tyler, for Rowand's performance of his agreement; and shortly after the agreement was executed, they gave their bond to Tyler to that effect. Rowand proceeded to build the mill and dam, and Hollinshead made him advances of money to a large amount, to enable him to go on; but Rowand, not having means sufficient and being indebted to Hollinshead in 450*l.*, offered to assign his interest in the agreement to Hollinshead, for 500*l.*, the latter to pay all Rowand's outstanding debts on account of the work, and engaging to finish it. Hollinshead, rather than assume the agreement, preferred sacrificing a part of what he had already advanced, and offered Tyler to give up 200 dollars if he would release him from the security he had entered

into. Taylor refused to do this; and then Hollinshead accepted from Rowand an assignment by indenture, dated 1st July, 1830, of all Rowand's interest, property, benefit and advantage, rights, claim and demand, in or under the agreement, for 500*l.*, which sum Hollinshead paid by allowing on account the debt of 450*l.* for advances already made, and paying the balance in money. And Rowand thereby appointed Hollinshead his attorney, to demand and receive from Tyler a lease, in the name of Rowand; and when such lease should be obtained for Rowand and in his name, but for the use and benefit of Hollinshead, to sell, assign or transfer the term, to such person or persons as Hollinshead should think fit. And in case Tyler should refuse to execute a lease, then to sue for and receive in the name of Rowand, but for *Hollinshead's own use and benefit*, all such damages as could be recovered for Tyler's non-performance. And Rowand covenanted with Hollinshead that he would not revoke, or attempt by any means to revoke, the powers therein given, nor in any way disturb or delay Hollinshead in the execution of the same. Upon this assignment, Hollinshead paid the debts which Rowand had contracted for the work (500*l.* and upwards), at his own expense completed the mill and dam, and complied in all respects with Rowand's undertakings in his agreement with Tyler, making the required erections within the period limited, and expending in the whole 1800*l.* and upwards. Immediately after taking the assignment from Rowand, Hollinshead gave notice to Tyler that he had done so. Rowand ceased to work at the mill, or to exercise any control over the premises. Hollinshead did everything thenceforward at his own charge, and directed in person—Tyler frequently visiting the mill and conversing with him, and being well aware that what was doing was by Hollinshead, *for his own benefit*, and that he alone was interested in the agreement. After Hollinshead had completed the work, at an expense of 1800*l.*, he called upon Tyler to give a lease, according to the agreement, which Tyler refused; and he was so far from complying that, soon after, he (Tyler) brought an ejectment against Hollinshead, who was then

in possession, and, having recovered a verdict, was put in possession of the mill and premises, and still holds the same. In 1831, before any release, such as is spoken of hereafter, was given by Rowand, Hollinshead commenced an action against Tyler in the name of Rowand, as authorised by the assignment which had been made to him. Process was served upon Tyler, returnable in Trinity, 1831, but the attorney who brought the suit neglected to proceed with it, and Hollinshead employed another attorney, Mr. Baldwin, who sued out process anew in April, 1832, and filed declaration in or as of Trinity Term, 1832. To this declaration Tyler pleaded, among other defences, a general release from Rowand to him, dated 29th September, 1831 (i. e. after the first action was brought, and before the second), sealed by Rowand, and releasing him from all actions and causes of action, suits, demands, &c., to the day of executing the release. By this release also, it appears, Rowand conveyed to Tyler the mills, dam, erections, &c., which he had previously assigned to Hollinshead, and which under such assignment had been completed by Hollinshead at his own charge. The consideration stated for the release and assignment was 50*l.* This release and assignment Rowand gave to Tyler without the consent or knowledge of Hollinshead, who swears that he believes Tyler obtained it by fraud and collusion, in order to defraud him of his property, and to deprive him of the means of obtaining redress. Hollinshead further declares that 50*l.* only, as he has been told, was to be paid by Tyler to Rowand for this release: that nothing was paid at the execution of the release, which was made upon the condition that 50*l.* should be paid to Rowand in case *Tyler recovered possession by the ejectment*; and this is in some measure confirmed by a letter produced in Rowand's handwriting. To the plea of release put in by Tyler, a replication was filed that "the release was obtained *from the plaintiff* by the fraud and covin of the defendant." Issue was taken on this, and, at the trial, it was attempted to sustain the replication by shewing from the circumstances above detailed that the plaintiff Rowand had given the release by covin with Tyler, to defeat Hollinshead, th-

assignee. It was objected on the part of the defendant, that the court could only look upon the record to see who was the plaintiff; and that they could not allow a release given by Rowand, the plaintiff on the record, to be defeated by evidence that he (the plaintiff) had given the release for a fraudulent purpose. The point was reserved, and a verdict given for 1750*l.* damages for the plaintiffs, subject to be set aside if the court should think, as the judge did at the trial, that the release must prevail upon the issue joined.—See *ante page 327.* It was decided in last Easter Term, that the release should have prevailed against Rowand's recovery at *Nisi Prius*, and that the plaintiff could not there legally obtain a verdict in the face of that release, whatever other course he might have taken, or may take, for avoiding it. The verdict for the plaintiff was accordingly set aside, and last term it was moved by the *Attorney General*, who thereupon obtained a rule nisi, on the part of Hollinshead, that the plea of the release be disallowed and taken off the files, on the ground of fraud and covin, and that the release, and a certain lease exhibited in evidence on the trial, remain impounded in the court.

ROBINSON, C. J.—Taking the facts to be as above stated, there can be no doubt whatever on which side lies the justice of the case. Hollinshead's statement, on which this motion is grounded, is corroborated in several of the leading features by affidavits of other persons, who declare that before the release, and before the action was brought in Rowand's name, Tyler had notice of his assignment to Hollinshead; and that after the assignment the works were completed solely at Hollinshead's expense, as Tyler well knew. No part of the statements advanced by Hollinshead is controverted. They stand uncontradicted, after the most ample time and opportunity have been afforded for explanation. On the part of Tyler but one affidavit is filed—that of the professional gentleman who prepared and was privy to the execution of Rowand's release; and this affidavit does not, in my opinion, contain a single statement that affects the justice and equity of the case. It seems, indeed, to have been advanced merely in order to establish,

in the first place, that Tyler did not instigate Rowand to give the release, but, on the contrary, was not aware of his intention to execute such an instrument until after it had been prepared and signed; and, secondly, that the professional gentlemen who drew and obtained the release had never been made aware by Rowand that he had assigned his whole beneficial interest in the original agreement to Hollinshead, but, on the contrary, had been misled to believe that Rowand had merely given him an authority to act for him; which authority he stated Hollinshead seemed inclined to abuse, to the prejudice of his principal. The first of these points it was doubtless intended should make in favour of Tyler; but taking all the other facts to be true, which stand uncontradicted, it can signify little, as far as Hollinshead's interests are concerned, or his claims to the protection of this court, whether Tyler was the original contriver or procurer of the release, or whether he seeks merely to avail himself of the fraudulent act of Rowand, now that he is made aware of it. What may have passed between Tyler and Rowand no man can tell. Tyler makes no affidavit. In such cases, the law deems it proper to refer the acceptance and confirmation by the person to be benefited to the original act and intention, and to consider him as having done, or prompted, what he afterwards acquiesces in and makes use of; and it is just to draw this conclusion. Now, as to the other point: It can clearly have no effect in Rowand's favour that he misled his counsel, and concealed from him the fact that he had long ago parted with all his interest under the original agreement to Hollinshead. It may seem to exonerate his counsel from any participation in the dishonest contrivance; but, in regard to the release itself, which is in question, it certainly cannot strengthen but does materially lessen its claim to respect, that it was founded and framed upon misrepresentation.

To look then at this case as it stands: For all that appears to us, it involves this question, whether Hollinshead, without any *fault* of his, must be dishonestly compelled to put up with a loss of 1700*l.* and upwards; and whether Tyler shall be allowed, without any *merit* of his,

to say the least of it, to get rid of an obligation which he had voluntarily incurred, and to profit to the extent of 1700*l.* by the unremunerated labour of Hollinshead. Undoubtedly the case *might* have been such as to give Hollinshead little or no claim to the protection of a court against such a loss. If the assignment to Hollinshead had been made in violation of an express undertaking between the parties, it would be different. In general, though we all know that, technically speaking, an agreement such as Tyler and Rowand entered into, cannot be assigned so as to give the assignee a right to sue in his own name, as on a negotiable instrument, yet, in point of fact and in effect, they are constantly transferred from hand to hand. Still Tyler *might* have chosen to stipulate against Rowand putting another in his place. He might have been influenced, in the first instance, by a desire to oblige him personally; he might have relied upon his being honourable, and not inclined to abuse the privilege granted him; and he might have had natural objections to any stranger being allowed to intrude into the possession of a piece of ground, forming a part of his farm. And if it had appeared that he really did intend to confine the privilege of building and using a mill on his farm to Rowand *personally*, and to his representatives, in case of death, and meant that he should not be allowed to place another in his room; if it had been shown that this was known and understood by Rowand, and that nevertheless *he* had, in disregard of the understanding, made an assignment of the agreement to Hollinshead, and more especially if Hollinshead, after being made acquainted with the true nature of the stipulations between the original parties, had intruded himself, against the will of Tyler; if such had been the case, we could readily bring ourselves to say that Hollinshead would have been entitled to no remedy which he could not strictly compel: that he could have no claim to any equitable interposition in his favour, and that if the result of a strict application of the rigid principles of law would leave him to suffer a considerable loss, he might be properly made to abide by such loss, as the consequence of his own improper conduct. But this is not such a case.

So far from it, in the agreement between Rowand and Tyler, Tyler *covenants* with Rowand, his heirs and *assigns*, to make a lease for 99 years, &c.; and where nothing is said to the contrary, it is the natural and common acceptation of such agreements, even where the word *assigns* is not mentioned, that the covenantee may part with his interest, as Rowand did here. It is further shewn, that the assignment was openly made known, and not objected to by Tyler, and that, in consequence of it, Hollingshead acted, and was allowed, without remonstrance from Tyler, to act, as if he had assumed the obligations of Rowand, and was to derive all the benefit that Rowand could have derived under it. It is material to observe that Tyler did not merely covenant *with Rowand* that he would make a lease, to him *and his assigns* for 99 years, but be covenants *with Rowand and his assigns* that he will make a lease, thereby admitting it to be in his contemplation that Rowand might assign not merely his lease, when he should get it, but his *agreement for* a lease. Now it under all these circumstances the assignee of Rowand may, as a matter of course, be defeated by a release given by Rowand in the face of his own assignment, and compelled to lose the whole benefit of a very large sum of money which he has actually expended, and so effectually defeated that he could have no redress in law or equity, it cannot be denied that a system of jurisprudence, under which so flagrant a wrong should admit of no remedy, would not be effectual in attaining the ends of justice. We have the law of England; and the law of England, in my opinion, does not, by any means, come short of affording redress in such a case. On the contrary, I consider it clear that *either* in law or equity, a person in Hollinshead's situation could find protection against Rowand's release. Here we have not a court of equity; and the question is forced upon us, whether this court of common law is competent to afford the protection required. And this question, in my opinion, is to be determined by us upon the same principles as such a question in a similar case must be determined in England—so far, I mean, as it is necessary for us to decide whether this court has *the*

power. In England, we know there are many cases in which parties entitled to relief against the legal consequences of certain acts, can only obtain that relief in equity ; and there are other cases, where it is held that courts of law do not want the power to relieve them, but where, nevertheless, they are told that they must resort to an equitable tribunal, because they can obtain relief the more effectually, and more conveniently, and by proceedings which will better insure complete justice to all parties. With respect to the first class of cases, wherever the courts of common law in England uniformly refuse to interpose, upon the principle that they are not *competent* to exercise the jurisdiction desired ; not merely because their powers cannot be *conveniently applied* to the object, but because, by the decisions of English judges, they are held upon legal grounds not to be *applicable*, and because the cognizance of such a case belongs exclusively to equity ; in all *such* cases, I should hold that this court is equally disabled from extending relief. We have no more power than the court of King's Bench in England to break down the boundaries between legal and equitable jurisdictions ; and whatever failure of justice may happen from there being no court of equity here, it is clear, not only that we are in no degree responsible for it, but that we should do more evil than good by casting off an adherence to principles, and disregarding all settled distinctions, in the attempt to afford a remedy which it is the business of the legislature to provide. But, in regard to the other description of cases, those I mean where it is admitted courts of law *may* relieve, but where it is nevertheless *usual*, in England, to refer the party to equity, I should hold it a matter of plain duty for us to extend the equitable relief for the attainment of justice, as far as we can find upon good authority that it has been extended by courts of common law in England ; and that it should be no conclusive argument with *us* that relief is in such cases generally sought in equity. We are bound, as much as we can, to guard against an absolute failure of justice ; and we must consider that when we say to a suitor in this province, you must go to a court of equity for

your remedy, we are referring him to a tribunal which does not exist, and are, in effect, declaring to him that he shall have no remedy at all. In other words, where, upon the principles of the law of England, relief *can only be had* in equity, there the party can, in this province, obtain no redress, because we have no court of equity; but where the party *may* in England have relief in a court of law, there I think we are bound, in a favourable case, not to withhold it, although in England the relief would, according to the prevailing practice, be afforded in courts of equity and not at law.

Proceeding upon this principle, and reverting to the facts before us, it appears to me obvious that Hollinshead has a strong claim to our interposition, for the purpose of protecting him against this clearly fraudulent release, if it is in our power to extend it; and that it *is* in our power to extend relief (the general principle being that releases fraudulently given, to the prejudice of third parties, shall be relieved against), unless we find that in a case of this nature the courts of common law in England hold themselves disabled from interfering; or unless, in the peculiar circumstances of the case, there be something which should restrain us from giving the relief desired. I mean, for instance, the circumstance of Hollinshead having long omitted to apply to set aside this release, and having, instead of this, replied to it, urging a defence which he could not support, and having forborne any application to the equitable interposition of this court until after the cause had been carried down to trial.

Upon the first point, I consider it to be quite clear that, in general, a court of common law will not allow a release, given by a person who has no real beneficial interest in the action or demand released, to be advanced to the prejudice of the person who has the real beneficial interest; but that they will set aside a plea founded upon such release, and will order the release itself to be cancelled, or disable the party from advancing it. It is impossible to deny this, without rejecting the authority of numerous cases, which, so far as I can find, have not been overruled or questioned.

I refer to those reported in Doug. 407; 1 B. & P. 447; 7 Taunt. 9, 48, 421; 2 B. & A. 370; 4 B. & A. 419; 4 Moore, 192; 7 Moore, 617, 356; 1 Ch. Rep. 390; 1 T. R. 621; 3 B. & C. 422; 3 D. M. 290. Where the authorities are so numerous and direct, it is not material to the decision of the question to inquire upon what principle it is that courts of law assume the right of thus interposing to prevent a fraudulent release from taking effect. I have no doubt, however, that it is upon the same principle that they interpose in a summary manner to stay proceedings in actions brought contrary to good faith, or set aside judgments fraudulently obtained, without consideration, or against the understanding between the parties. Indeed, it is certain that courts of common law have always exercised a concurrent jurisdiction with courts of equity, in relieving against positive fraud: and the high tribunals in England, to which I allude, have never admitted that they must of necessity allow themselves to become the passive instruments of carrying into effect plain and admitted frauds: that they must helplessly look on and see their forms employed in advancing the most palpable dishonesty and chicane, and must allow the fraud to proceed until an equitable tribunal chooses to interpose and check the flagrant injustice.

We see clearly that in England the courts of common law, in cases such as that before us, do in fact adopt a very different course, and one more consistent with their honour and with the ends of justice; and I know no ground on which we can refuse to follow in their steps. If there be any ground, it must be from some peculiarity in the facts of this individual case. I see none upon which, if I were inclined, I could be warranted in resting a refusal to extend the relief prayed for. It is true the application comes in a late stage. The plaintiff might have moved to set aside the plea before he replied to it, and he ought to have done so. Instead of that, he comes now, after failing to support the issue which he raised upon it; and after a trial and a verdict rendered, which has been set aside, he asks to have the record altered, and desires to have that plea struck out

to which he has ineffectually replied. It may therefore be argued against him, and it has been argued, that he is open to these objections; 1st, that where a party waives a plea or other defence which he might urge, or voluntarily takes other grounds, he is bound by his election, and should not be admitted to avail himself afterwards of the defence which he has waived; and 2ndly, that besides the waiver, he is precluded by the mere delay, and by the rule which obliges a person desiring relief, either against irregularity or on the footing of indulgence, to apply for it the first opportunity and without unnecessary delay. These objections were sought to be strengthened on the argument of this motion, by maintaining that instances were not to be found of the court ordering or allowing pleas to be withdrawn after a verdict, and after a new trial granted. That, however, is taking ground which cannot be supported; for it is enough to refer to the cases reported in 1 Doug. 112, 1 Wils. 223, 2 Wils. 254, 3 Wils. 275, 1 Burr. 224, to prove that the courts do grant such permission when it seems necessary to the ends of justice. As to waiver or delay, no case was cited, and I believe it would be difficult to find any, where the court, being satisfied that a fraud is shewn, has refused to relieve against it and suffered it to succeed, merely because the party had not promptly applied to the court for their equitable interposition; and besides, I cannot say that, in my opinion, is just to assume that the replication filed to the plea of release (which replication was in Rowand's name to be sure, but was in truth pleaded for and on the behalf of Hollinshead) was such as ought to be regarded as a waiver of defence now advanced. In replying that the release was obtained from Rowand by fraud, the party or his council may seriously have thought that they could substantiate their replication, by shewing that it was obtained by Tyler by fraudulent collusion with Rowand, to defeat Hollinshead, the real plaintiff. He did in fact give such evidence at the trial; and he argued there and afterwards in term, that it was evidence pertinent to the issue. I cannot say I even thought it was; but I can readily believe that Hollinshead, or his counsel, may have

thought so, because one or both of my brothers seemed to have a good deal of doubt, even after the argument whether the evidence was not relevant for the purpose for which it was offered ; and certainly, if that replication was relied upon, although erroneously, for opening to the party pleading the opportunity of objecting the very fraud that he now complains of, it cannot be said that he voluntarily and intentionally waived the imputation of fraud, and that he ought, on that account, to be now precluded from advancing it. I conceive that, so far as the objections of *waiver* and *delay* are concerned, we are to be governed by the principles which the court conforms to in regard to amendments generally, which are now allowed or withheld, according as the granting them will tend to the furtherance of justice—the broad rule being to allow them where they will evidently tend to that object, taking care at the same time that the other party shall have no just cause to complain that he receives injury from the amendment itself, or the terms in which it is granted. Now here, I consider the simple question to be, whether Rowand shall be allowed to defraud Hollinshead of 1700*l.* or 1800*l.* It cannot be just that he should be suffered to do so, and it cannot be said that Tyler suffers any actual injustice from the fraud being prevented. If this application had been made immediately upon the plea being filed, we should, I think, have found it our duty to grant it. By deferring it, Tyler, to be sure, has been allowed to incur expense that would otherwise have been saved. Against this he will be indemnified by the terms to be imposed as to costs ; and he has nothing then to complain of but the disappointment of a hope that, through Rowand's fraudulent act, he might succeed in keeping a valuable mill, built by Hollinshead at an expense of 1500*l.*, without paying any one a farthing for it. The disappointment of such an expectation is not an injury. On the contrary, we should only be justified in leaving Hollinshead's wrong unredressed by finding that, for some reason, we are restrained by principles of law, or the authority of adjudged cases, from extending an interference so

highly equitable. I repeat, that I know no ground on which I could rest the refusal.

It was suggested that in all the cases where the courts in England have interfered in the manner prayed for here, it has been for the purpose of protecting the interest of a third person, whose rights were derived under or *created by* the very instrument itself which has been fraudulently released, as in the case of trustees releasing to the prejudice of their *cestui qui trust*, when the interest of the latter is apparent in the deed itself. In this case, it is said the claim of Hollinshead is grounded wholly on a subsequent assignment of a chose in action, and that a party voluntarily placing himself in that situation, has no claim to expect that the court will interpose in this extraordinary manner to protect him. There is no weight in this argument, in my opinion. It is true that some of the cases are of the kind stated—namely, where the interest of the third party arises from a trust created in the very deed referred to in the release; but it is not by any means true that they are all of that description, and that the court interposed in no other. The cases I have cited, in which the court have interposed, are not all such as this argument supposes. Some of them are where the interest of the third party arose, as Hollinshead does here, by a subsequent assignment of an instrument not strictly assignable in law. The common case of bonds assigned is undistinguishable from this. The assignee claims only under an assignment which he has taken of an obligation, which, technically speaking, is not assignable, for which reason he is compelled to sue, as Hollinshead does here, in the name of the original party; but, nevertheless, if the obligee releases in fraud of the assignee, the court will set aside the release, and will not suffer the obligor to advance it in prejudice of the assignee. The case of *Alver v. Gage*. 1 Campb. 393, is even stronger. But, moreover, it may be said justly, that the claim of Hollinshead is one within the contemplation of Tyler, when he entered into the covenant, for he expressly covenants with Rowand and his *assigns* to make the release, which he now refuses to give.

On the whole, referring particularly to the cases of Manning v. Cox, 6 Moore, 617; 3 B. & C. 422; and 5 B. & C. 290; I am of opinion that this motion should be granted, and the rule made absolute, so far as respects the setting aside the plea of release and the issue thereupon, and the restraining the defendant from setting up that release in bar of the plaintiff's recovery.

We have been requested by the counsel for the defendant rather to order a nonsuit, in pursuance of the reservation made at Nisi Prius, when the case was tried in April, 1833; but the court in banc have already determined that, although being of opinion with the defendant that the replication was not sustained by the evidence offered, they might have ordered a nonsuit under the power reserved at Nisi Prius, yet the more just and expedient course was rather to set aside the plaintiff's verdict and award a new trial, in order that the opportunity might be afforded of making the motion we have now disposed of. To have ordered a nonsuit would only have exposed both parties to a protracted litigation, in order to arrive at the same result. If the defendant, since he is disabled from advancing this release, has any other defence of which he would desire to avail himself, we should allow him to plead *de nova*.

SHERWOOD, J., gave no opinion, having been absent at the argument.

MACAULAY, J.—Upon a consideration of the cases noted, I am of opinion that it would have been competent to the court, upon the plaintiff's application before the replication to the plea of release, to have directed that plea to be removed from off the files, and to have restrained the defendant from pleading or using the same as a defence in this action, upon proof by affidavit to their satisfaction of the previous assignment to Hollinshead, and of the fraudulent nature of the subsequent release by the plaintiff. And it appears to me that the appeal to the equitable interposition of the court, at this stage of the proceeding, is strengthened by the verdict of a jury, since set aside upon technical grounds; inasmuch as such jury affirmed the fraud which Hollinshead's affidavits tend to establish. It would be

gross injustice to suffer the release to be used as a bar in this action, so long as the court possesses the power to prevent it. Whether, upon any other ground, the defendant has a meritorious defence, is of course quite another question. But it seems to me that, to prevent him to avail himself of the release under the circumstances disclosed, would be to frustrate and not to promote the ends of justice, in a proceeding properly within the equitable control of the court.—See Sal. 260. 1 Doug. 407; 2 Esp. N. P. C. 657; 7 T. R. 663, 670 (n); 1 Cam. 30; 2 Cam. 93; 4 East. 234; 1 B. & P. 447; 1 Cam. N. P. C. 392; 7 Taunt. 9, 48, 421; 2 B. & A. 370; 4 B. & A. 419; 1 Ch. Rep. 390; 4 Moor. 192; 7 Moor. 356; 1 Y. & J. 362; 7 Moor. 617; 9 B. & C. 437; 3 B. & C. 422; 5 D. & R. 290; 2 Str. 1042; 4 Tyr. 446.

Per Cur.—Rule absolute.

TALBOT v. McDougall.

A new trial was granted after a verdict for plaintiff, on payment of costs, where the evidence at the trial for the plaintiff was not very satisfactory, and would have entirely failed, without the testimony of one witness, who, it was sworn, was a man of bad character, and had stated after the trial that he had been hired to give evidence, the defendant also swearing, that all that witness had stated was false.

This was an action of assumpsit brought against defendant, an overseer of highways, to recover wages earned by the plaintiff, who had been employed by him in superintending the application of statute labour. The defence was that the plaintiff had collected monies on account of the highways, from persons liable to pay, and had received a larger amount unaccounted for than would cover any claim he had proved against the defendant. To meet this defence, the plaintiff attempted to shew that he had at various times paid over to defendant the monies he had collected; but the evidence was by no means conclusive as to what he had received or paid over. He brought forward one Daniel Fuller, to prove a payment in his presence of 20*l.*; which the defendant wholly denied. The jury gave a verdict for the plaintiff; which the defendant this term moved to set aside, on the ground that it was unsupported by the evidence, and he filed several affidavits representing Fuller

to be a person utterly unworthy of credit, proving an admission of his, since the trial, that he had been hired to give the evidence he did, and stating conversations of his at variance with his testimony on oath.

On case shewn by the plaintiff, the court granted a new trial on payment of costs, the Chief Justice stating that he was not influenced merely by the affidavits impeaching the credit of Fuller, though they were strong; but as the verdict was not clearly supported by evidence, and without the testimony of Fuller could not be maintained, and as there appeared much reason to apprehend that the defendant may have been taken by surprise by the testimony of a man whose character is strongly impeached, and whose statement at the trial the defendant has gone the length of declaring on oath to be utterly false, it seemed a case in which the ends of justice required another trial, the result of the last not resting on clear and satisfactory grounds.

Per Cur.—Rule absolute on payment of costs.

BERRY, ONE, ETC., V. ANDRUSS.

A defendant, after admitting service of the copy of an attorney's bill, cannot question the genuineness of the signature of the attorney on the copy he received.

The month's prior service on the defendant of a copy of an attorney's bill before action brought, under 2 Geo. II. ch. 23, is a *lunar* month; and the day on which the service is made, is *inclusive*.

This was an action of assumpsit for fees as an attorney; and in order to prove the service of the bill of costs a month previous to the action, pursuant to the statute 2 Geo. II. ch. 23, the plaintiff gave in evidence a bill amounting to £—, concluding with an intimation to the defendant that such constituted his demand, and at the bottom of which was subscribed his proper hand. On the back of the bill was indorsed the following admission of the defendant's attorney, made with the view of dispensing with the attendance of the witness who made the service: "I admit the delivery of this bill on the 29th May, 1834. M. O'Reilly, defendant's attorney." It was then proved that the writ had been issued on the 24th June following. A nonsuit was moved for on two grounds: 1st, that the bill delivered was not

proved to have been subscribed with the proper hand of the plaintiff, according to the statute ; and 2ndly, that the action was commenced before the expiration of a month after the delivery of such bill. The judge who tried the cause at the last Gore assizes overruled the first objection, as being involved in the admission of the defendant's attorney indorsed on the bill produced, which was subscribed with plaintiff's proper hand, but reserved the latter. *Mr. O'Reilly*, for the plaintiffs, moved this term for leave to enter a nonsuit on the point reserved, or for a new trial on the ground of misdirection in the objection overruled. *Draper* shewed cause.

ROBINSON, C. J.—Upon the first point, on the ground that the admission of service indorsed on the bill produced (which was made expressly in order to prevent the necessity of calling a witness to prove it) must be taken to have admitted an *effectual* service of that specific bill, and as the service could not be effectual unless the one delivered had (as well as the one produced) the name of the attorney subscribed, I consider that the defendant cannot, after admitting the service of the bill, question the genuineness of the signature on the copy he received. I am confirmed in my opinion, that the service of the bill was in this case sufficiently proved, by referring to *Champneys v. Peck*, 1 Stark, N. P. C. 326. Upon the second point, I think the time sufficient. The month intended by the statute 2 Geo. II. ch. 23, is a lunar, not a calendar month (*Hurd v. Leach*, 5 Esp. N. P. C. 168), and the day on which the service is made is inclusive.—*Castle and another v. Burditt*, 3 T. R. 623, and the cases there cited.

SHERWOOD, J., concurred.

MACAULAY, J.—The statute 2 Geo. II. ch. 23, sec. 23, enacts that no attorney shall commence or maintain any action or suit for the recovery of any fees, &c., until the expiration of one month or more after such attorney shall have delivered to the party to be charged therewith, &c., a bill of such fees, &c., which bill shall be subscribed with the proper hand of such attorney. A lunar month is sufficient ; and when a thing is to be done in a time specified,

after a particular fact, the *day of the fact* is to be reckoned as *inclusive*; but when from the *time* of the fact the day may be excluded.—Boulton v. Ruttan, note 1 MS.S. Rep. 468. Now the month in the present case is to be computed from the *act* done, and not the *time* of the act. Consequently the day of service is inclusive, and the month expired on the 23rd June. The action was not therefore prematurely commenced on the 24th June. Then as to the plaintiff's signature to the bill, his proper hand is subscribed to the copy produced; the service of which copy is admitted by the written acknowledgment of the defendant's attorney, thereon indorsed. I apprehend therefore that if it be questioned, it could only be done by the defendant, upon production of the bill that was served.—5 Esp. 168; 6 T. R. 226; 1 Bing. 167; Hob. 139; Doug. 464-5; 3 T. R. 623; 5 Rep. 1; Cro. Jac. 135; 1 Lord Ray. 280, 283; 3 East. 67; 1 H. B. 14; 2 East. 254; 2 B. & B. 822; Sal. 625; Cowp. 714; 2 Car. 296; 2 B. & C. 586; 4 Moore, 4; 2 Stark. 538; 6 B. & C. 399; 2 Camp. 110; 1 Stark. 404.

Per Cur.—Rule discharged.

HEWARD v. McDougall.

Before parol or secondary evidence can be given of a note being received by the plaintiff in satisfaction of a claim for work done, the defendant must prove that he has given notice to the plaintiff to produce the note.

This was an action of assumpsit, which plaintiff brought against defendant upon an agreement to pay him a stipulated sum for his labour in passing 200,000 feet of deal boards down the river Credit; and the case was tried upon the general issue, at the last assizes for the Home District. The defence was that plaintiff and defendant had referred their disputes to arbitration, and that the defendant, before the award was made, had, according to agreement, deposited with one of the arbitrators his promissory note for 60*l.*, indorsed by his brother, which note was made payable at the office of the Commercial Bank in 90 days, and was to be handed over to the plaintiff if an award were made in his favour, to secure the amount of such award, whatever it might be: that the arbitrators awarded 53*l.* to the plain-

tiff, and that the note was in consequence given up to plaintiff. The plaintiff denied that he had ever received the note, and it was proved that it had never been presented at the bank for payment, although the 90 days were long since elapsed. It was objected that the facts set up constituted no defence, and that there was no legal evidence that such a note was made and delivered: none being produced and no notice given to the plaintiff to produce the note, which was necessary before parol evidence could be received of it. The Chief Justice recommended the jury to find for the plaintiff the sum ascertained by the arbitrators, 53*l.*; and reserved leave to move to enter a verdict for the defendant, if the court should be of opinion that the evidence constituted a defence. The jury found that the plaintiff had received the note; but the question remained, whether they had such evidence of it as ought to have been admitted. They gave a verdict for the plaintiff, 53*l.*

In this term it was moved, upon the leave reserved, by *Draper* for defendant, to set aside that verdict and enter a verdict for the defendant, upon the ground that the note being negotiable, and as, for all that appeared, it might be in the hands of an innocent holder, to whom the plaintiff might have endorsed it before it became due, for value, the plaintiff could not recover without accounting for the note. A rule nisi was granted, but upon cause shewn by *Baldwin* for plaintiff.

The Court determined that the defendant, not having given notice to the plaintiff to produce the note, could not give secondary evidence of it, and that it was therefore proper the verdict should stand.

Rule discharged.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN THE
KING'S BENCH AND PRACTICE COURTS,
FROM MICHAELMAS TERM, 3 WILL. IV. TO MICHAELMAS TERM,
5 WILL. 4., INCLUSIVE.
VOL. II. (OLD SERIES).

ABSCONDING DEBTOR.

Setting aside attachment against.] The court refused to set aside an attachment against an absconding debtor, upon the ground that the debtor had been previously held to bail for the same cause of action, and the bail had been discharged from their liability by a reference to arbitration.—*Mozier v. McCann*, 77.

Setting aside attachment against, for irregularity in not suing out process for a year.] When no process had been issued against an absconding debtor for about a year after the writ of attachment had been sued out, the proceedings were set aside for irregularity.—*Bank Upper Canada v. Spafford*. 78.

Absconding debtor giving cognovit for debt not due. Money received under the cognovit, by the defendant's attorney and the sheriff, ordered by the court to be paid to bona fide creditors.] When a debtor who absconded from the province, before his departure gave his cognovit for 700l. to a person to whom he was not

indebted, on which judgment was entered, execution issued, and some money made by the sheriff, and some paid to the plaintiff's attorney, the court, on the affidavits and application of several *bona fide* creditors of the absconding debtor, ordered the attorney to pay to the sheriff the money he had received, and the sheriff to divide all the money between the creditors who had executions in his hands, ratably according to their several claims. *Bergin v. Pindar*, 575.

Setting aside attachment against. Affidavits defective.] An affidavit, upon which an attachment was ordered, in which the debt sworn to was for money lent and advanced to the defendant, without saying by whom: *Held* defective, and the attachment set aside. An office copy of the affidavit, filed in the office of the Clerk of the Crown at York, is sufficient to move upon.—*McKenzie v. Bussell*, 343.

The property of a person who usually resides in the United States, but who engages in an

undertaking in this country, employs persons here, and comes frequently to superintend their work, may be attached under the Absconding Debtors' Act.—*Ford v. Lusher*, 428.

ACTION.

Money paid to use of defendant.] Where A. sold land to B. for 225*l.*, and B. sold it to C. for the same sum, and C. sold to D.; and it was agreed between A., C. and D. that D. should pay A., who thereupon discharged B., who discharged C.; and A. agreed to take from D. land in payment of 200*l.* of the purchase money, and took D.'s promissory note for 25*l.*, the residue; but having subsequently borrowed 95*l.* of D., instead of receiving at once a deed of the land in payment of the 200*l.*, he took a bond that a deed should be made to him on the repayment of the 95*l.*, by instalments; but having made default in the payment of these, he abandoned the bond and notes given by D., and brought an action against B. for the 225*l.*, as money paid to his use: *Held*, that the action could not be maintained, A. having lost his remedy on D.'s bond through his own default, and therefore having no right to make B. pay the money.—*Holmes v. Spencer*, 161.

Landlord and tenant. Property in wheat.] A. leased a farm to B., upon the condition that B. was to deliver to him one-half of the wheat to be raised on the farm. B. was to harvest it, and thrash it, and deliver it into the defendant's granary. *Held, per Cur.*, that under this agreement, A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that there-

fore no legal property in the wheat could vest in A. till B. the tenant had thrashed it, and delivered to him his portion.

A party purchasing at sheriff's sale a crop of wheat, may bring trespass against a person converting or injuring it, though he may never have received possession of the field.

Semblé, that in order to maintain a title as vendee at a sheriff's sale, it is not necessary to prove an actual seizure antecedent to the sale, and before the return of the writ.

Quare.—Is the sale by the sheriff, of a crop of wheat ready for the harvest, as sale of a mere chattel, not requiring a writing under the Statute of Frauds?—and if no writing is required, still, to satisfy the statute and make the sale legal, should there not be proof of the delivery of the wheat, or payment of the price?

Quare.—Where an attaching creditor becomes himself the purchaser at the sheriff's sale, and sues for a trespass to the property purchased, should he prove a debt to support his attachment.—*Haydon v. Crawford*, 583.

AFFIDAVIT.

Affidavit sworn to by two persons. Jurat.] An affidavit purporting to be sworn by two persons, was offered by the plaintiff's counsel; but the jurat not stating distinctly that both deponents had been sworn, the court would not allow it to be read.—*Nicholson dem. Spafford v. Roe*, 84.

Affidavit for an attachment. Money lent. Office copy.] An affidavit, upon which an attachment was ordered, in which the debt sworn to was for money lent and advanced to the defendant,

without saying by whom—*Held defective, and the attachment set aside. An office copy of the affidavit, filed in the office of the Clerk of the Crown, at York, is sufficient to move upon.*—McKenzie v. Bussell, 343.

Entitling of affidavit. Consent rule.] The plaintiff set forth the particular lot he went for, in the declaration, and the defendant entered into a general consent rule, not specifying the premises particularly. The plaintiff, after passing the record on this rule, entered judgment by default, treating the consent rule as a nullity; and the court set aside the judgment as irregular, and held the defendant's affidavit, entitled as under the consent rule, correct.—Doe Thompson v. Putnam et al., 312.

AFFIRMATION BY QUAKER.

Arrest of a defendant by affirmation.] Where the plaintiff, a Quaker, resident in New York, made an affirmation of his claim before the recorder of that city; and his agent in this country, also a Quaker, made another affirmation proving the handwriting of the defendant and the recorder; that the plaintiff was a Quaker, and that the person styling himself recorder was such, and had authority to take such an affirmation; and that he was apprehensive the defendant would leave the province, &c.: the court granted an order to hold to bail.—Smith v. Lawrence, 18.

AGENT.

General power of attorney to sign bills, &c. Endorsement of bills by.] A general power of attorney to an agent to sign bills, notes, &c., and to superintend, manage and direct all the affairs of

the principal, gives him a power to endorse notes.—Auldjo v. McDonell, 199.

ARREST.

Second arrest for same cause of action.] Where a party, having been arrested, was discharged, on a mere clerical mistake in the affidavit to hold to bail, the court refused to discharge him from a second arrest for the same cause of action.—Sheldon et al. v. Hamilton, 65.

What commencement of suit in action for a malicious.] In case of a malicious arrest, the declaration, and not the writ, was held to be the commencement of the suit.—Cameron v. Fergusson, 318.

Examined copy of affidavit. Proof of defendant's making affidavit.] In an action for a malicious arrest, an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant.—Spafford v. Buchanan, 391.

Stay of proceedings. Defendant arrested.] Where commenced by non-bailable process, defendant obtained an order for particulars, with stay of proceedings till given, plaintiff, before delivering particulars, held defendant to bail on an *alias ca. sa.*, *Held regular.*—Wilson v. Wilson, 297.

ARBITRATION.

Award. Assumpsit. Taxed costs.] A case was referred to arbitration, costs to abide the event; and the arbitrators having made no award, the parties agreed to refer the case to any judge of the district court who should first

come to Perth; and a district court judge having come there, heard the evidence and awarded that the plaintiff in that suit had no cause of action, and that judgment should be entered for the defendant. *Held*, that the award was good, and that the defendant might maintain assumpsit for the taxed costs of the cause, and was not obliged to enter judgment.—*Hale v. Mathison*, 78.

Setting aside an award. Umpire.] Where a plaintiff, having two actions pending—one in a representative character, and the other in his own right—referred both to arbitrators, who were to make their award by a certain day, or appoint an umpire in writing; and the arbitrators not being able to agree, appointed, but not by writing, an umpire, who made an award, which the arbitrators adopted and published as their own, before the time limited for making their award had expired, and awarded thereby a sum of money to the plaintiff in his representative character.—The court, on affidavits of the umpire and one of the arbitrators, that the money was intended for the plaintiff in his own right, refused to grant an attachment for non-payment of the sum awarded, and afterwards on motion set the award aside.—*Dennison v. Sandford*, 379.

ASSAULT AND BATTERY.

Justification of. Mitigation of damages. Evidence.] In trespass for an assault and battery, the defendant offered to prove, in mitigation of damages, that the plaintiff had used very slanderous expressions concerning defendant's wife, during defendant's absence from home, and which, being repeated to defendant on his

return, he on the spur of the moment went to plaintiff and assaulted him. This evidence was refused, and the jury gave a verdict with 140*l.* damages. The court set aside the verdict to give an opportunity to elicit the whole circumstances of the transaction.—*Short v. Lewis*, 385.

ASSUMPSIT.

Infant. Right to maintain assumpsit.] Where a father took shares in an association (which had been formed to build a steam-boat, to be navigated for the joint benefit of the proprietors) in the name of his son, then an infant; and afterwards, and during the minority of the child, directed two of these shares to be transferred to the defendant, which was done; *Held*, that the infant could not, on obtaining his majority, maintain assumpsit for money, had and received, to recover dividend of profit which had accrued on these shares, and had been received by the defendant.—*Hall v. Bidwell*, 22.

Right to maintain assumpsit on an award for the taxed costs.] A cause was referred to arbitration, costs to abide the event; and the arbitrators having made no award, the parties agreed to refer the cause to any judge of the district court who should first come to Perth; and a district court judge having come there, heard the evidence, and awarded that the plaintiff in that suit had no cause of action, and that judgment should be entered for the defendant. *Held*, that the award was good, and that the defendant might maintain assumpsit for the taxed costs of the cause, and was not obliged to enter judgment.—*Hale v. Mathison*, 78.

ATTORNEY AND SOLICITOR.

Bill. Setting aside proceedings against an.] When all the proceedings against an attorney subsequent to filing the bill had been set aside, and plaintiff afterwards proceeded without serving a copy of the bill anew; the court set aside the subsequent proceedings for irregularity, but without costs, thinking the objection had little merit in it.—*Frazer v. Boulton*, one, &c., 19.

ATTACHMENT.

Special bail. Supersedeas.] Where a defendant, against whose property an attachment has issued, puts in special bail, the court will order a *supersedeas* to the attachment.—*Clark v. Mallery*, 157.

Time for plaintiff to take first step on the.] A plaintiff cannot take a step in a cause founded on the Attachment Law, until the three months allowed for the defendant to put in bail have arrived.—*Banker v. Griffin*, 163.

Against deputy clerk of crown for having issued process without authority.] An attachment was granted against a deputy clerk of the crown, for having issued serviceable process without authority, and afterwards, on his appearance in term to answer interrogatories, the court directed him to be dismissed from his office, and to pay the costs of the proceeding.—*Rex v. Fraser*, 547.

Discharging attachment.] Rule to return *ca. re.* in Trinity term. In July, the writ appears to have been in the hands of the plaintiff's agent, and in August the attachment issued. The court discharged it, on paying costs up to the time it was returned, although a trial had been lost.—*Rex v. Sherwood*, 305.

Property attached under absconding Debtors' Act. Where party usually resided in the United States.] The property of a person who usually resides in the United States, but who engages in an undertaking in this country, employs persons here, and comes frequently to superintend their work, may be attached under the Absconding Debtors' Act.—*Ford v. Lusher*, 428.

Attachment against Judge of District Court.] This court will not order an attachment against a judge of a district court, for not obeying a *certiorari*, unless it be shewn clearly that he acted contumaciously.—*In re. Judge of the District Court of the District of Niagara*, 437.

Sureties previous to execution must reside in this province.] The sureties in the bond, required under the attachment law previous to issuing execution, must reside in this province.—*Bradbury v. Lowry*, 439.

Attaching creditors. Proof of debt to support attachment.] *Quære—* Where an attaching creditor becomes himself the purchaser at the sheriff's sale, and sues for a trespass to the property purchased, should he prove a debt to support his attachment?—*Hayden v. Crawford*, 583.

The court refused an attachment against a witness for not proving a cognovit until an order had been made on him to prove it, and he disobeyed it.—*Ham v. Ham*, 176.

BAIL.

Perfecting bail.] Bail must not only be put in, but perfected, before moving to stay proceedings upon the bail bond, on the usual terms.—*Gould v. Birmingham*, 298.

BAIL-PIECE.

Entitling of bail-piece. Margin of.] A bail piece may be entitled of a term preceding that in which the *ca. re.* is returnable, but a bail piece must state in the margin the district from which the process issued, with that in which the bail is taken, as thus: "Testamentum from the Home District to the Niagara District."—Ward v. Skinner, 163.

BOND.

Bond to the limits. Averments in declaration.] In a declaration on a bond to the limits, given by a debtor in execution, it is necessary to shew the judgment, writ, and arrest of the debtor, and the execution of the bond while he was in custody, and the recital of these facts in the bond set out in the declaration will not be sufficient.—Leonard v. McBride, 1.

Sureties. Bond. Where they must reside.] The sureties in the bond, required under the attachment law previous to issuing execution, must reside in this province.—Bradbury v. Lowry, 439.

CA. SA.

Ca. sa. Affidavit. Judge of the court of King's Bench, Montreal.] The court will order a ca. sa. on an affidavit sworn before a judge of the court of King's Bench of Montreal, his signature being verified by affidavit sworn here.—Coit v. Wing, 439.

Defendant's costs.] A defendant is entitled to a writ of *capias ad satisfaciendum* for the costs of his defence.—Thompson v. Leonard, 151.

CERTIORARI.

To inferior court. After verdict.] A certiorari will not lie to an inferior court, the District

Court, for instance, after verdict, although the court may be of opinion that evidence, which has been rejected by the judge below, should have been received by him on the trial of the cause.—Tully v. Glass, 149.

Removing cause from the District Court to Queen's Bench.] A writ of certiorari, under the 19 Geo. III. ch. 70, may issue in this province, for the purpose of removing a cause from the District Court into this court.—Baldwin and Quesnel v. Roddy, 167.

Judge of District Court not obeying certiorari.] This court will not order an attachment against a judge of a district court, for not obeying a certiorari, unless it be shewn clearly that he acted contumaciously.—In re Judge of the District Court of the District of Niagara, 437.

COGNOVIT.

Attachment against a witness for not proving] The court refused an attachment against a witness for not proving a cognovit, until an order had been made on him to prove it, and he disobeyed it.—Ham v. Ham, 176.

COMMON COUNTS.

Had and received. Accounts stated. Value received.] The words "value received," in an agreement to the following effect: "I promised to pay A. B. or bearer, 25*l.* value received, to be paid in merchantable wheat at market price," import a debt due, and are *prima facie* evidence of a consideration, and such an agreement may be shewn under the counts for money had and received and the account stated.—Waddell v. McCabe, 502.

Goods sold and delivered.] Where the defendant in this coun-

try, ordered certain articles of clothing to be made and sent to him by the plaintiff from England, and on their arrival here they were received by the plaintiff's agent, who did not tender them to nor leave them with the defendant, although he demanded payment for them, which was refused. *Held* that an action for goods sold and delivered would not lie, but that the plaintiff should have declared specially for the non-appearance.—*Lane v. Melville*, 124.

CONVICTION.

Conviction for selling spirituous liquors. Quashed] A conviction, under Geo. III. ch. 4, for selling spirituous liquors without license, was quashed, because the information stated that "the defendant was in the habit of selling spirituous liquors without license," without charging any specific offence, and not shewing time nor place, nor that the liquors were sold by retail, and also, because the conviction directed the defendant to pay the costs of the prosecution, without specifying the amount—*The King v. Ferguson*, 220.

COVENANT.

Right of plaintiff to sue in, for rent charge, under the facts.] Agreement, by which plaintiff agreed to convey defendant to this province, and to assign him 100 acres of land in the township of M., and to give or procure him a title thereto in fee, as soon, &c., Defendant agreed that the allotment to be made should be subject to the payment of one bushel of wheat yearly, for every acre cleared, for ever, to commence at the end of three years, if the defendant should have been placed on his land; with a proviso to extin-

guish such rent charge. *Held*, that the plaintiff could maintain covenant for this rent charge, the defendant having been placed on his allotment for three years, although no patent for the land had issued, or any deed of it made, creating such rent charge.—*McNab v. McFarlane*, 287.

Covenant for good title. Vendee against vendor. The vendee having given a mortgage to vendor for the purchase money.] Where a purchaser reconveys the same lands to his vendor by mortgage in fee, to secure payment of the purchase money, he cannot sustain an action against the vendor for breach of covenant for good title, while the mortgage continues in force.—*Huyck v. McDonald*, 292.

Plea of release to covenant. Fraud. Setting aside release.] Where, in an action of covenant to a plea of release, the plaintiff replied, that it was procured by fraud and covin, on which issue was joined, and at the trial it appeared that before any breach of the covenant, the plaintiff had assigned his interest in the subject matter to a third party, and that this action was brought for the benefit of such third party, whom the plaintiff and defendant had combined by the release to defraud—*Held*, that, under the pleadings, such evidence was inadmissible, as the court could not travel out of the record, and the party interested should have applied to set the release aside.—*Rowand v. Tyler*, 563.

Covenant for good title. Amount of damages.] In an action for breach of covenant for good title, no damages can be recovered for improvements, or the increased value of the land, the purchase

money and interest forming the measure of damages.—*McKinnon v. Burrows*, 590.

COSTS.

Full costs. Payment after action brought.] When damages were assessed at a sum within the jurisdiction of the District Court, on a promissory note which had been reduced to that amount by payment made after action brought, the court ordered the master to tax the plaintiff his full costs.—*Kilborn v. Wallace*, 17.

Full costs. One of the plaintiff's judge of District Court.] Where two plaintiffs, one of whom is sole judge of the District Court of the district in which the defendant resided, sued in the King's Bench in a cause of action within the District Court jurisdiction—*Held*, that they were entitled to full costs.—*Jones et al. v. Wing*, 36.

Two actions in ejectment. Same parties. Same premises. Second action stayed till payment of costs of first.] In a second ejectment for the same premises, between the same parties, proceedings were stayed for non-payment of the costs of the first.—*Doe Lake v. Davis*, 311.

Sheriff. Rule to return writ. Costs.—Where a sheriff, being ruled to return a writ, enclosed it to the clerk of the crown, three or four days after the rule expired, so that it was not in the files when search made, but was produced in open court by the clerk; the court refused the attachment, for the purpose of making the sheriff pay the costs.—*Andrew v. Robertson et al.* 304.

Not going to trial pursuant to short notice. Costs.] Where defendant's attorney agreed to accept short notice of trial, provided his wit-

nesses could be got to court in time, and accordingly procured their attendance, and plaintiff did not call on the cause. *Held*, that the defendant was entitled to costs for not going to trial pursuant to such short notice.—*Harris v. Hawkins*, 142.

Rule absolute with costs, though more asked for than could be granted.] When a motion was made to set aside the writ and the arrest for irregularity, and to discharge him out of custody, or to deliver up the bail bond to be cancelled, as the case might be, the court made it absolute with costs, although more was asked than could be granted.—*Armstrong v. Scobell*, 303.

Full costs.] The court ordered full costs on an assessment of damages upon a cause of action exceeding 30*l.*, but under 40*l.*, it being a case in which the court would have granted a certificate, if there had been a trial. In another it was refused.—*Ferrie v. Young, McGill v. Stull*, 140.

Defendants's costs. Ca. sa.] A defendant is entitled to a writ of *capias ad satisfaciendum* for the costs of his defence. *Thomson v. Leonard*, 151.

DAMAGES, ASSESSMENT OF.

Debt on bond. Instalments. Breach of conditions. Assessment.] In debt on an arbitration bond, where only one instalment of the sum awarded was due when the process was sued out, but the non-payment of the second was, together with the first assigned for breach of the condition—*Held*, that the plaintiff could assess his damages for non-payment of both sums.—*Leach v. Stevenson*, 310.

DEPUTY CLERK OF THE CROWN.

Attachment against. Issuing process without authority.] An attachment was granted against a deputy-clerk of the crown, for having issued serviceable process without authority, and afterwards, on his appearance in term to answer interrogatories, the court directed him to be dismissed from his office, and to pay the costs of the proceedings.—*Rex v. Fraser*, 247.

EASEMENT.

Private right of way. Prescription.] In trespass quare clausum fregit, a plea of right of way under a deed must shew the parties to the deed; and a private right of way cannot be claimed by prescription in a less period than twenty years.—*Smith v. Smith*, 215.

EJECTMENT.

Proof required to be given by son and heir.] In ejectment, if the lessor of the plaintiff claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father.—*Doe Humberstone v. Thomas*, 33.

Admissions of plaintiff in ejectment—a real person—the lessor being an infant.] The admissions of a plaintiff in ejectment, being a real person (the lessor being an infant) are not evidence to prevent the recovery of the premises.—*Nicholson dem. Spafford v. Roe*.—84.

Purchaser at sheriff's sale. Sheriff's deed prima facie evidence of.] In ejectment by a purchaser of lands sold under an execution, the sheriff's deed is prima facie evidence that the writ was de-

livered to the sheriff, and the lands seized and sold under it.—*Doe Spafford v. Brown & Brown*, 90.

Purchaser of land sold for taxes. What he must prove.] In ejectment by the purchaser of lands sold for taxes at sheriff's sale, under 6 Geo. IV., ch. 7, it is necessary for him to prove that the writ to sell was grounded on the treasurer's return shewing arrears of taxes for eight years, and that there was no sufficient distress on the lands to levy the amount; and, *Sembla*, it is also necessary to prove that the land had been "described or granted."—*Doe Bell v. Reaumore*, 243.

Plaintiff nonsuited. New trial.] Where, after plea pleaded in ejectment, the plaintiff was nonsuited because no one appeared on behalf of the defendant to confess lease, entry and ouster, the court, on affidavit that the defendant's attorney had forwarded the title deeds and other documents to counsel for the purpose of making a defence, which did not arrive in time, and on an affidavit of merits, granted a new trial on payment of costs.—*Doe Clark v. McQueen*, 69.

Release by lessor in. Executor. Trustee.] A lessor in ejectment will not be allowed to release the action. A release by an executor who is also a trustee, does not release trustee.—*Doe Boyer et al. v. Clause*, 146.

Several and distinct defences by defendant.] The defendant in ejectment may shew several matters against the plaintiff's right to recover, as, that the title was in a third person, an failing in that, that from his position with respect to the lessor he was entitled to a notice to quit, or a demand of pos-

session.—Quære.—See *Maitland v. Dillabough*, 4 U. C. R. 214.

Surrender to the King.] A tenant in fee may surrender his estate back to the king, by act and operation of law, as, by accepting a new grant for the same land, or he may surrender by matter of record; but a surrender not of record, or a surrender by record, founded on an invalid title, is insufficient.—*Doe McDonnell v. McDougall*, 177.

Single. Against several tenants of different apartments in one house.] Where several tenants occupied different apartments in one house, as several tenements; *Held*, that the single action of ejection might be brought for the recovery of the premises, serving each tenant with a copy and notice.—*Doe Bell v. Roe*. 64.

Second ejection. Costs of first.] In a second ejection for the same premises between the same parties, proceedings were stayed for non-payment of the costs of the first; the plaintiff proceeded notwithstanding, and was nonsuited for the not confessing lease, entry and ouster. The affidavit on which the defendant moved to set aside the proceedings was so worded as to be evidently made in the first cause, but the court overruled this exception, and set aside the proceedings.—*Doe Lake v. Davis*, 311.

Declaration specifying lot. Consent rule general. Setting aside judgment. Entitling of affidavit.] The plaintiff set forth the particular lot he went for in his declaration, and the defendant entered into a general consent rule, not specifying the premises particularly. The plaintiff, after passing the record on this rule, entered judgment by default, treating the

consent rule as a nullity; and the court set the judgment aside as irregular, and held the defendant's affidavit entitled, as under the consent rule, correct.—*Doe Thompson v. Putnam*, 312.

Heir-at-law out of possession making deed.] Where there is an adverse possession of land, an heir-at-law, who has never entered, cannot make a conveyance so as to enable his vendee to recover in ejectment.—*Doe Dixon v. Grant*, 511.

EVIDENCE.

Presumption under sheriff's deed.] In ejectment by a purchaser of lands sold under an execution, the sheriff's deed is *prima facie* evidence that the writ was delivered to the sheriff, and the lands seized and sold under it.—*Doe Spafford v. Brown & Brown*, 90.

Admissions of a real plaintiff in ejectment, the lessor being an infant.] The admissions of a plaintiff in ejectment, being a real person (the lessor being an infant) are not evidence to prevent the recovery of the premises.—*Nicholson dem. Spafford v. Roe*, 84.

Heir-at-law. Ejectment. Evidence.] In ejectment, if the lessor of the plaintiffs claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father.—*Doe Humberstone v. Thomas*, 33.

Covenant for title, Breach. Issue. Evidence under.] In covenant for title, the breach assigned was, that defendant had no title. The defendant pleaded that he was lawfully seized, &c. *Held*, that the affirmative of this issue lay upon defendant, although the plaintiff offered no evidence in support of his breach.—*McKinnon v. Burrows*, 114.

Necessity of producing the best evidence.] In assumpsit for the delivering goods, after the plaintiffs had proved a verbal agreement, the delivery of part of the goods, and also an undertaking by the defendant that he would not exercise a certain trade within a fixed distance of the plaintiffs, the defendant gave in evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce, and the copy of the agreement in the affidavit of debt not stating anything about that part of the undertaking proved by the plaintiff, concerning the exercise of the defendant's trade. *Held*, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement, by their affidavit of debt; and that as the writing was the best evidence, it should have been produced; and that that part of the evidence concerning the exercise of the defendant's trade not being contained in it, should have been rejected.—*Gilbert et al. v. Sleeper*, 135.

Allowance for road. How proved. Copy of plan.] A piece of land, marked out in the original plan of a township as an allowance for road, does not lose that character because it has never been used as a road for a period of forty years; and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom nor from what materials the plan was compiled.—*Badgely v. Bender*, 221.

Parole evidence. Grants from the

Crown.] Where, in trespass for cutting timber, the question was, in which of two townships there was an allowance for road, and the grants from the crown not being very explicit, the plaintiff endeavoured to support his construction of the grant by parol evidence, which was rebutted by the defendant by parol testimony also, and the jury found for the defendant; the court held such finding right, and that parol evidence was admissible.—*Miller v. Palmer & Carr*, 425.

Vendee's title at sheriff's sale, proof of.] Semble, that in order to maintain a title as vendee at a sheriff's sale, it is not necessary to prove an actual seizure antecedent to the sale, and before the return of the writ.—*Haydon v. Crawford*, 583.

Slander. Evidence in mitigation of damages.] In trespass for an assault and battery, the defendant offered to prove in mitigation of damages, that the plaintiff had used very slanderous expressions concerning defendant's wife, during defendant's absence from home, and which, being repeated to defendant on his return, he on the spur of the moment went to plaintiff and assaulted him. This evidence was refused, and the jury gave a verdict with 150*l.* damages. The court set aside the verdict, to give an opportunity to elicit the whole circumstances of the transaction.—*Short v. Lewis*, 385.

In trespass. Under general issue.] In trespass for driving against the plaintiff's horse, and killing him, the defendant cannot, under the general issue, give in evidence that the accident happened from the plaintiff's negligence, or without any fault on the

part of the defendant, but such defence must be pleaded.—Macdonald v. Monk, 20.

Grants from Crown. Ambiguity in respect of premises. Evidence to assist construction.] In actions in which the King is a party in the construction of grants from the crown, where there is an ambiguity in respect of the premises, as for instance, what is to be considered the bank of a river; other grants from the crown are admissible in evidence, to assist the construction; and grants from the crown, either for a valuable consideration or of especial favour, are to be construed in the same manner as deeds from subject to subject.—Clark and Street v. Bonnycastle, 528.

Promissory note. Secondary evidence. Notice to produce.] Before parol or secondary evidence can be given of a note being received by the plaintiff in satisfaction of a claim for work done, the plaintiff must prove that he has given notice to the plaintiff to produce the note.—Heward v. McDougall, 6.

In actions of ejectment.] Vide “Ejectment.”

Promissory Notes.] Vide “Bills and Notes.”

Trespass.] Vide “Trespass.”

EXECUTION.

Fi. fa., goods. Return. Fi. fa., Lands. Purchaser at sheriff's sale.] It is irregular to issue a *fieri facias* against lands, until after the return of the execution against goods; but as it is only an irregularity, a purchaser at sheriff's sale, under the writ against lands, cannot be affected by it.—Doe Spafford v. James Brown, 92.

Defendant. Costs of defence. Ca.

sa.] A defendant is entitled to a writ of *capias ad satisfaciendum* for the costs of his defence.—Thompson v. Leonard, 151.

Against testator's lands. On return of nulla bona to writ against goods.] A judgment against an executor to recover *de bonis testatoris*, will warrant an execution against the testator's lands, on the return of *nulla bona* to the writ against goods.—Doe Jessup v. Bartlett.

Surplus in sheriff's hands after sale. Fi. fa. lands upon a judgment against an executor. Heir-at-law.] When lands have been sold by a sheriff under a *fi. fa.*, upon a judgment against an executor or an administrator, the heir-at-law is entitled to recover the surplus from the sheriff.—Ruggles v. Beikie, 276 & 347.

EXECUTOR.

Production of probate of will by.] An executor suing for a cause of action, arising after the death of his testator, must, under the general issue, produce the probate of the will; but where, on the general issue pleaded to a declaration containing counts for a cause of action in the time of the testator, as well as since his death, both causes of action were proved, but no probate was produced; it was held, that the production was unnecessary, as it appeared on the record, from a verdict being found for a cause of action in the time of the testator, that the plaintiffs were executors.—McGill, Exrs. v. Bell, 618.

Release by Trustee.] A lessor in ejectment will not be allowed to release the action. A release by an executor who is also a trustee does not release trustee.—Doe Boyer v. Clause, 46.

FI. FA.

Vide "Execution."

FORWARDER.

The liability of.] A Forwarder is a common carrier, and is not liable for loss arising from the act of God, or the King's enemies.—Smith v. Whiting, 597.

FRAUDS, STATUTE OF.

17th section.] Where A. purchased plate of B. of the value of £70; and directed him to have his crest engraved on it, and afterwards to forward it to his place of residence, but paid no part of the purchase money, nor any earnest, and B. having obeyed his orders, brought an action against him for the price, A. having refused to receive the plate, saying, that it was not the same as he purchased: *Held*, that A.'s directions for the engraving of the crest, and the forwarding to his place of residence, constituted a sufficient acceptance and delivery, to take the case out of the 17th section of the Statute of Frauds. Walker v. Boulton, 252.

Sale of a crop of wheat, ready for harvest, by Sheriff.] *Quære.*—Is the sale by the Sheriff, of a crop of wheat ready for the harvest, a sale of a mere chattel not requiring a writing under the Statute of Frauds? And if no writing is required, still, to satisfy the statute and make the sale legal, should there not be proof of delivery of the wheat, or payment of the price?—Hayden v. Crawford, 583.

GAMING.

Illegal wagers. 13 Geo., II. ch. 19.] A. betted B. 75*l* to 50*l*. upon a horse-race, and deposited the money in the hands of C., a stakeholder. They did not own

either of the horses which were to run, nor was there any other match or stake for which the horses were to run. A. lost and disputing it, gave C. notice not to pay over the money to B., but C. did so. *Held*, that A. could recover back the deposit from C., in an action for money had and received, upon the ground that the wager was illegal, being contrary to the statute 13 Geo. II., ch. 19.—Sheldon v. Law, 75.

GROWING TIMBER.

Notice of sale of growing timber by deed. Subsequent conveyance of Land. Registry laws.] Mere notice of the execution of a previous deed for the sale of growing timber, will not defeat the operation of a subsequent conveyance of the land, if the latter be registered first. Growing timber is so far real estate, that to be severed from the inheritance by deed or demise, the conveyance or will must be duly enregistered to pass the interest intended to be conveyed.—Ellis v. Grubb, 611.

HEIR-AT-LAW.

Proof by, in ejectment.] In ejectment, if the lessor of the plaintiff claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father.—Doe Humberstone v. Thomas, 33.

Entitled to surplus of money from Sheriff from sale of ancestor's land on a Fi. Fa. in Executor's hands.] The heir-at-law is entitled to recover from a sheriff the surplus of monies arising from a sale of his ancestor's lands, on a *fieri facias* against those lands, in the hands of the executor.—Ruggles v. Beckie, 276 & 347.

Adverse possession. Right to make a deed, by.—Where there is an adverse possession of land, an heir-at-law, who has never entered, cannot make a conveyance, so as to enable his vendee to recover in ejectment.—Doe Dixon v. Grant, 511.

Mother's possession. As against the heir, her child. Tenant-at-will, his heir.] The possession of a mother will not be considered tortious as against the heir, being her own child; but will rather be treated as the possession of a guardian. If on the death of a tenant-at-will, his heir enter, such entry is tortious; and if the heir die, and his heir enter, the original owner or his heir will be put to right.—Doe Moak v. Empey, 435.

HIGHWAY.

Indictment for obstructing.] An indictment for obstruction a highway, laid out under 50 Geo. III. ch. 1, cannot be supported, when the highway has not been established in the manner marked out by the statute, as when the report to the magistrates in Quarter Sessions by the Surveyor of Roads, does not express the exact width of the road, nor the precise line in which it is to run. And *semble*, in such a case all the steps necessary to be taken, before a highway can be legally established under the act, should be proved by the prosecutor to have been taken before the defendant can be found guilty.—The King v. Sanderson, 103.

What sufficient to make out an allowance for.] A piece of land, marked out in the original plan of a township, as an allowance for road, does not lose that character, because it has never been used as a road for a period of forty years,

and a copy of the original plan of the Township is admissible in evidence to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled.—Badgely v. Bender, 221.

INFANT.

Action by.] Where a father took share in an association (which had been formed to build a steamboat to be navigated for the joint benefit of the proprietors) in the name of his son, then an infant; and afterwards, and during the minority of the child, directed two of these shares to be transferred to the defendant, which was done: *Held*, that the infant could not, on obtaining his majority, maintain assumpsit for money had and received, to recover dividends of profit which had accrued on these shares, and had been received by the defendant.—Hall v. Bidwell, 22.

Lessor of plaintiff in ejectment an. Admissions.) The admissions of a plaintiff in ejectment being a real person, (the lessor being an infant) are not evidence to prevent the recovery of the premises.—Nicholson dem. Spafford, v. Roe, 84.

JUDGE OF THE DISTRICT COURT.

This Court will not order an attachment against a judge of a District Court for not obeying a certiorari, unless it be shewn clearly that he acted contumaciously.—In re Judge of the Niagara District, 437.

LAND.

Testator's lands liable to execution on return of nulla bona.—A judgment against an executor to recover de bonis testatoris, will

warrant an execution against the testator's lands, on the return of nulla bona to the suit against goods.—*Doe Jessup v. Bartlett*, 26. Vide “Execution.”

LANDLORD AND TENANT.

Vide “Ejectment,”

Agreement to deliver half of wheat. Relation of Landlord and Tenant..] A leased a farm to B upon the condition that B was to deliver to him one-half of the wheat to be raised on the farm. B was to harvest it, and thrash it, and deliver it into the defendant's granary. *Held per cur*, that under the agreement, A and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that therefore no legal property in the wheat could vest in A till B, the tenant, had thrashed it, and delivered to him his portion,—*Haydon v. Crawford*, 583.

LIMITATION, STATUTE OF.

Notes payable to bearer.—When the Statute begins to run.] The right of action on a note payable to A B or bearer, does not accrue to a third person as bearer, till an actual delivery to him. And when C, being in the United States, purchased a note payable to bearer, and on his coming into this province, got possession of it, and brought an action upon it, to which the defendant pleaded *actio non accrevit infra sex annos*; and plaintiff replied he was in foreign parts when the cause of action accrued: *Held*, that the facts did not warrant a verdict upon this issue for the plaintiff, as the cause of action accrued to him when he received the note, which was within six years, and within the Province, and not

when he made the purchase in the United States.—*Shaw v. Matthison*, 57.

MANDAMUS.

Municipal Corporations. Contested elections. The Court will, if circumstances require it, issue a mandamus to a Municipal Corporation, to compel them to proceed in the trial of a contested election.—*In re Denham and the Corporation of the City of Toronto*.

MORTGAGE.

Breach of covenant for good title. Vendee of land against vendor, having given a mortgage for purchase money.] Where a purchaser re-conveys the same lands to his vendor, by mortgage in fee, to secure payment of the purchase money; he cannot sustain an action against the vendor for breach of covenant for good title, while the mortgage continues in force.—*Huyck v. McDonald*, 292.

NEW ASSIGNMENT.

Time to plead to a.] The defendant has the same time, viz. eight days, to plead to a new assignment, or to a declaration.—*Unger v. Crosby*, 175.

NEW TRIAL.

At instance of plaintiff.]—When a plaintiff's damages were assessed at a less sum than the evidence appeared to warrant, the court at his instance ordered a new assessment on payment of costs of the day.—*Leonard v. Pauling*, 17.

Where justice apparently has not been done.] Where a trial was put off at the assizes, on affidavit of the absence of material witnesses, and on payment of costs of the day, and defendant's attorney declined paying those costs himself, the defendant being ab-

sent, in consequence of which, the trial proceeded, and no defence was made : the court, on affidavits which gave reason to apprehend justice had not been done, and considering the large amount of the verdict, granted a new trial, on payment of costs.—*Oliver v. Stephens, et al.* 21.

In ejectment. After nonsuit. On affidavit.] Where after plea pleaded in ejectment the plaintiff was nonsuited, because no one appeared on behalf of the defendant to confess lease, entry and ouster, the court on affidavit that the defendant's attorney had forwarded title deeds and other documents to counsel, for the purpose of making a defence, which did not arrive in time, and on an affidavit of merits, granted a new trial, on payment of costs.—*Doe Clark v. McQueen.* 69.

Second new trial refused.—Laches of defendant.]—When a new trial had been granted to give a defendant an opportunity of setting up a defence, of which he did not avail himself, the court refused again to interfere.—*Ross v. McNab,* 309.

Witness after trial convicted of forgery. No ground for.] In slander, accusing the plaintiff of larceny, and a verdict for £150 damages, the court refused a new trial, either on the ground of excessive damages, or that one of the principal witnesses for the plaintiff was shortly after trial convicted of forgery and sentenced to banishment.—*Eakins v. Evans,* 383.

New trial, where only one witness for plaintiff, and who, after trial, stated that he had been heard to give evidence.] A new trial was granted after a verdict for the plaintiff, on payment of costs,

where the evidence at the trial for the plaintiff was not very satisfactory, and would have entirely failed without the testimony of one witness, who, it was sworn, was a man of bad character, and had stated after the trial, that he had been hired to give evidence; the defendant also swearing, that all that the witness had stated was false.—*Talbot v. McDonnell,* 6.

NOTICE.

Party shewing himself to be in possession of an instrument. Notice to produce unnecessary.] In assumpsit for not delivering goods, after the plaintiff had proved a verbal agreement, the delivery of part of the goods, and also an undertaking by the defendant that he would not exercise a certain trade within a fixed distance of the plaintiff's the defendant gave as evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing, incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce, and the copy of the agreement in the affidavit of debt not stating any thing about that part of the undertaking provided by the plaintiff, concerning the exercise of the defendant's trade: *Held,* that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement by their affidavit of debt, and that as the writing was the best evidence, it should have been produced, so that that part of the evidence concerning the exercise of the defendant's trade, not being contained in it, should have been rejected.—*Gilbert v. Sleeper,* 135.

PATENTS.

Construction of.] In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises—as for instance, what is to be considered the bank of a river—other grants from the Crown are admissible in evidence to assist the construction; and grants from the Crown, either for a valuable consideration, or of especial favour, are to be construed in the same manner as deeds from subject to subject.—Clark and Street v. Bonnycastle, 528.

PAYMENT.

Promissory note. Payment.] A note of hand was lodged with an attorney for collection. The defendant being judge of a District Court, agreed to give him credit for his fees from time to time, which were to be made up quarterly, and endorsed on the note. The attorney received credit to an amount sufficient to pay the note, but only endorsed a small portion, and after promising to endorse the whole, ultimately refused, and subsequently absconded. *Held*, that in an action brought by the owner of the note, the defendant could not avail himself of the credit given the attorney of a payment.—Ketchum v. Powell, 157.

PARTICULARS.

Particulars of demand. Stay of proceedings.] After a demand made and sworn to, the court made a rule for particulars of demand to be delivered and to stay proceedings in the mean time absolute in the first instance.—Butler v. Richardson, 605.

PARTNER.

On a balance admitted, one partner can sue another.] When on a dissolution of partnership, one partner has admitted a balance, assumpsit will lie although there is no promise to pay; and in one case, where the balance did not appear conclusively, and the judge at Nisi Prius left it to the jury more unfavorably for the plaintiff than he might have done, and there was a verdict for the defendant, a new trial was granted on payment of costs.—McNichol v. McEwen, 485.

PLEADING.

Goods sold and delivered.—Pleadings specially.] Where the defendant in this country ordered certain articles of clothing to be made and sent to him by the plaintiff from England, and on their arrival here they were received by the plaintiff's agent, who did not tender them to, nor leave them with the defendant, although he demanded payment for them, which was refused: *Held*, that an action for goods sold and delivered would not lie, but that the plaintiff should have declared specially for the non acceptance.—Lane v. Melville, 124.

Trespass qua. clau. fre. Plea. Replication de injuria.] Where in trespass *quare clausum fregit* and *de bonis aspurtatis*, the defendant makes title in his plea and gives color, the plaintiff cannot reply generally as to a plea of *liberum tenementum*; but must traverse the title alleged or reply specially; and to reply to a plea justifying the removal of goods, as encumbering the defendant's close that the defendant was not lawfully possessed, or *de injuria* generally, where the defence pleaded

rests upon a title of possession, not connected with the personal conduct of the parties,—is bad.—Thompson v. Breakenridge, 170.

Bail bond. Assignee of sheriff. Venue.] Declaration by assignee of sheriff on a bail bond. Venue in the margin in the Home District. Assignment of the bond stated in the declaration to be at S. in the Western District, without laying any venue for this act in the Home District. Held, bad on special demurrer.—Beal v. Field, 236.

Release pleaded. Fraud.—Third party. Record. Setting aside release.] Where, in an action of covenant to a plea of release, the plaintiff replied, that it was procured by fraud and covin, on which issue was joined, and at the trial it appeared, that before any breach of the covenant the plaintiff had assigned his interest in the subject matter to a third party, and that this action was brought for the benefit of such third party, whom the plaintiff and defendant had *combined* by the release to defraud. Held, that, under the pleadings, such evidence was inadmissible, as the court could not travel out of the record, and the party interested should have applied to set the release aside.—Rowand v. Tyler, 563.

Declaration Averments. Breach.] Debt on bond, conditioned on delivery of *good merchantable* grain, to deliver a certain quantity of whiskey. Plaintiff avers he did deliver the said *distillery* grain, but that defendants did not deliver the whiskey. Declaration held bad on special demurrer.—Cowper v. Fairman, 568.

Plea puis darrein continuance. Foreign judgment.] A plea of a

foreign judgment, pleaded *puis darrein continuance*, must show that the cause arose since the last continuance and that judgment was on the merits, and conclusive between the parties in the court or country where it was given, or plea will be bad; and semble, such a judgment properly pleaded would be a bar.—McPhedran v. Lusher, 602.

Plea of release. Fraud Verdict.] Even after verdict, the court will order a plea of release to be taken off the files, if clearly shewn to be fraudulent.—Rowand v. Tyler, 631.

Vide—“Promissory Notes”—and “Trespass.”

POUNDAGE.

Fi. fa. lands Compromise before sale.] *Quære.*—If a sheriff is entitled to poundage or a *fi. fa.* against lands, where he advertizes the lands, but before a sale the parties compromise.—Gates et al. v. Crooks, 286.

POWER OF ATTORNEY.

General power to sign bills, &c. Power to indorse.] A general power of attorney to an agent to sign bills, notes, and to superintend, manage and direct, all the affairs of the principal, gives him a power to *indorse* notes; and an endorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain, on shewing who they are and that they act in that capacity, to vest the note in them, so as to give their indorsee the right of suing upon it.—Auldjo v. McDougall, 199.

PRACTICE.

Costs of the day.] Where defendant's attorney agreed to accept short notice of trial, provided his witnesses could be got to court

in time, and accordingly procured their attendance, and plaintiff did not call on the case: *Held*, that defendant was entitled to costs for not going to trial pursuant to such short notice.—*Harris v. Hawkins*, 142.

Fi. fa. original. Testatum.—*Amendment.*] The court allowed an original writ of *fi. fa.* to an outer district to be amended, by making it a *testatum*, and an original writ to warrant the *testatum* to be sued out, after the first writ had been placed in the sheriff's hands, and after a motion to set aside proceedings for irregularity without costs, and discharged the rule for setting aside the proceedings without costs.—*Fisher v. Brooke*, 143.

Interlocutory Judgment. Pleas filed. Served.] It is sufficient if pleas be filed in the proper office to prevent a plaintiff signing judgment, though they have not been served.—*McKinnon v. Johnston*, 169.

Time to plead to a new assignment.] The defendant has the same time, viz., eight days, to plead to a new assignment as to a declaration.—*Unger v. Crosby*, 175.

Cognovit. Witness. Attachment.] The court refused an attachment against a witness for not proving a cognovit until an order had been made on him to prove it, and he disobeyed it.—*Ham v. Ham*, 176.

Interlocutory Judgment.] Where pleas were not entitled to the cause nor signed by the attorney, but were endorsed with the style of the suit, and the attorney's name, and were regularly filed and conserved, and the plaintiff treated them as a nullity; and signed interlocutory judgment,

the court set the judgment aside.—*Averill v. Cameron*, 176.

Particulars demanded with stay of proceedings. Defendant arrested before particulars given.] Action commenced by non-bailable process. Defendant obtained an order for particulars, with stay of proceedings till given. Plaintiff, before delivering particulars, held defendant to bail on *alias ca. re. Held* regular.—*Wilson v. Wilson*, 297.

Term's notice.] Action against two defendants. After issue joined and after four terms had elapsed, but within a year, one of the defendant's having been arrested put in special bail, and gave a cognovit retracting his plea; the plaintiff proceeded against the other. *Held*, that the other defendant was entitled to a term's notice.—*Yates v. Carney and Griswold*, 31.

Costs.] When a motion was made to set aside a writ and the arrest for irregularity, and to discharge him out of custody, or to deliver up the bail bond to be cancelled, as the case might be, the court made it absolute with costs, although more was asked than could be granted.—*Armstrong v. Scobell*, 303.

Irrégularité. Verdict. Affidavit of merits.] When pending a motion to set aside proceedings for irregularity, defendant pleads, in consequence of which the plaintiff proceeds to trial, the court refused to set aside the verdict or otherwise to interfere, though no defence made, no actual merits being disclosed on affidavit.—*Simpson, Assignee, v. Mathison and Ward v. Ward*, 305.

Setting aside defective proceedings. Copies. When proceedings are defective in point of form, and are objected to on that account,

copies must be produced in support of the application.—Smart v. Demerea, 440.

Particulars of demand. Stay of proceedings.] After a demand made and sworn to, the court made a rule for particulars of demand to be delivered, and to stay proceedings in the mean time, absolute in the first instance.—Butler v. Richardson, 605.

Passing record without Pleas in Office.] Defendant having filed his pleas, plaintiff, on going to pass his record, and not finding them in the office, caused them to be entered on the record, and passed the record without the plea being in the office, and gave notice of trial, and tried the cause, no defence being made; the Court set aside the proceedings for irregularity.—McKinnon v. Johnston, 298.

Serving of Process of Ca. Re.] A writ of *ca. re.*, not bailable, must be served by the sheriff or his officers, though the deputy sheriff be a party to the suit.—Ruttan v. Ashford, 302.

Service of Declaration on Defendant instead of Attorney.] When an appearance was actually entered by defendant's attorney, although it seemed to have been mislaid by the deputy-clerk of the crown, and the plaintiff served his declaration on the defendant, and not his attorney, and then signed judgment for want of a plea, the Court set aside the proceedings with costs.—Ryan v. Leonard, 307.

Venue.—Changing of Venue by Plaintiff.] The Court will not change the venue on the application of the plaintiff, after issue joined, unless a very special ground be laid for it.—Crooks v. House, 308.

Damages to be assessed where one instalment is due when process sued out, but non-payment of second instalment with the first is assigned for breach of the condition.] In debt on an arbitration bond, where only one instalment of the sum awarded was due when the process was sued out; but the non-payment of the second was, together with the first, assigned for breach of the condition: *Held*, that the plaintiff could assess his damages for non-payment of both suits.—Leach v. Stevenson, 310.

Mesne process. Issued from Principal Office. Appearance.—Deputy's Office.] It is irregular to issue process from the principal's office, and to give the defendant notice to appear at a deputy's office in another district.—Forsyth v. Hartwell, 439.

Ca.sa. affidavit to support, sworn before a Judge of K. B. Montreal.] The court will order a *ca.sa.* on an affidavit sworn before a judge of K.B. of Montreal, his signature being verified by affidavit sworn here.—Coit v. Wing, 439.

Attorney's Bill. Service. Signature of Attorney. Lunar Month.] A defendant, after admitting service of the copy of an attorney's bill, cannot question the genuineness of the signature of the attorney on the copy he received.

Three months' prior service on the defendant of a copy of an attorney's bill, before action brought under the 2d George II. ch. 23, is a *lunar month*, and the day in which the service is made is *inclusive*.—Berry, one, &c., v. Andruss, 645.

Vide "Affirmation."
PRISONER.

Time within which to discharge prisoner on bail charged

with a felony in Ireland.] The Court refused to discharge a prisoner brought up on *habeas corpus*, charged with having murdered his wife in Ireland, communications having been made by the provincial to the home government on the subject, and no answer received, and the prisoner having been in custody less than a year; and bail in such cases will not be allowed, until a year has elapsed from the time of the first imprisonment, although no proceedings have in the mean time been taken by the crown.—*Rex v. Fitzgerald*, 300.

PROMISSORY NOTE.

Presentment.] When the defendant (an absconding debtor) on the day a note became due wrote to the plaintiffs, stating his inability to pay, and requesting further time; the Court held this rendered proof of presentment unnecessary, although the notes were payable at a particular place.—*McDonnell v. Lowry*, 302.

Special Defence to an action on a.] Assumpsit upon a promissory note transferred by the payee to the plaintiff after it became due. On non-assumpsit, the defence set up was, that the defendant and the payee had a settlement, when defendant agreed to convey a lot of land within six months, to give over certain stock, and to give the note now sued upon, the payee agreeing to deliver up to defendant certain promissory notes according to a schedule. Defendant delivered the stock, gave his note, and mutual receipts were exchanged. Defendant then accompanied payee to his house, in order to get the promissory notes in the schedule; but payee had only a part, which defendant refused to accept, unless the whole

were delivered up to him. It did not appear that the land had since been conveyed, nor what amount of the promissory notes was deficient; but at the trial, the jury found that payee, at the time of the settlement, concealed from the defendant that he had not all the promissory notes in the schedule in his possession—*Held*, that the defendant could urge these facts as a defence to this action on his note.—*McCollum v. Church*, 356.

Special defence to a.] Where A. and B. exchanged horses, each taking the other's, and B. gave A. a promissory note for a difference of value in the exchange; A. sold the horse he got from B. almost immediately; and after a lapse of two years, during which nothing appears to have been done by either party, B. is sued upon his note by A.: *Held*, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault or blemish at the time of sale.—*Hall v. Coleman*, 39.

Power of an attorney to an agent to sign. Endorsement.] A general power of attorney to an agent to sign bills, notes, &c., and to superintend, manage, and direct all the affairs of the principal, gives him a power to endorse notes.—*Auljo v. McDougall*, 199.

Joint maker of; his competency as a witness.] One maker of a joint promissory note is not a competent witness for another, who alone is sued, without a release, as he is not indifferently liable to the payee and his co-maker, being liable in an action by the latter for contribution to both damages and costs.—*Dudley v. Moore*, 71.

Secondary Evidence of.] Before parol or secondary evidence can be given of a note being received by the plaintiff in satisfaction of a claim for work done, the plaintiff must prove that he has given notice to the plaintiff to produce the note.—Heward v. Macdougall, 647.

QUO WARRANTO.

Brockville Police Act. Validity of election. Mandamus. Quo Warranto.] The court will not grant a mandamus to try an election of corporate officers chosen under the Brockville Police Act, but will leave the parties contesting the validity of such election to their remedy by information in the nature of a *quo warranto*.—Election Board of Police, Brockville, 173.

REGISTRY.

Sale of timber. Subsequent sale of land. Notice. Registry laws.] Mere notice of the execution of a previous deed for the sale of growing timber will not defeat the operation of a subsequent conveyance of the land, if the latter be registered first.

Growing timber is so far real estate, that, to be severed from the inheritance by deed or devise, the conveyance or will must be duly enregistered to pass the interest intended to be conveyed.—Ellis v. Grubb, 611.

RELEASE.

Vide "Pleading," Rowand v. Tyler.

RIDEAU CANAL.

Lock keeper of. Trover for detaining lumber.] Trover lies against a lock-keeper on the Rideau Canal, for not delivering up lumber seized and detained by him under the provisions of the Rideau

Canal Act (8 Geo. IV. c. 1.) for obstructing the navigation, on a tender of the charges occasioned by such seizure, and the removal of the obstruction.—Gould v. Jones, 53.

SEDUCTION.

Rape. Subsequent seduction. Right of action.] Case for seduction will lie to recover damages, arising from subsequent connection, though the evidence strongly tends to show that the defendant had in the first instance committed a rape on the girl.—Hayle v. Hayle, 295.

SHERIFF.

Sued for false return. Arrangement between plaintiff and defendant.] Where a writ of *fieri facias* was placed in a sheriff's hands against the goods of a defendant, who was in possession of personal property in his district at the time, and a levy was made, but the plaintiff afterwards compromised with the defendant, receiving payment of his debt by instalments, but giving no directions to the sheriff to discharge the defendant's property: *Held*, that on a return of *nulla bona* by the sheriff several months afterwards, when the defendant had absconded without satisfying the balance of the debt, the plaintiff could not sue for a false return, as he was precluded by the arrangement which he had made with the defendant.—Everarghim v. Leonard, sheriff, 121.

Liability of, for escape from limits.] When a debtor on the limits, on a writ of *capias ad satisfacendum*, issued out of a district court, was brought in by his bail for surrender to the sheriff, who refused to receive him except at the gaol, but gave a certificate,

which was taken away by the bail, that the gaoler might receive him, and the bail did not then surrender him, but some time after (the debtor, in the meantime having gone off the limits) gave him up to the sheriff, who kept him in close custody until he was discharged by an order of the judge of the district court : *Held*, that an action for false imprisonment would not lie against the sheriff for taking the debtor on the second surrender, the first having been conditional, and the condition not complied with, and the escape having been negligent and voluntary.—*Thomson v. Leonard*, 151.

In contempt for not bringing the body, relief of.] The court relieved a sheriff on payment of costs, bail being perfected, where he was in contempt for not bringing in the body, although a trial had been lost ; it appearing that the sheriff was not in fault for the loss of such trial, and it being sworn that the application was made solely on his behalf.—*Ward v. Skinner*, 235.

Surplus in sheriff's hands from sale of ancestor's lands on a f. fa. in the hands of executor.] The heir at law is entitled to recover from a sheriff the surplus of monies arising from a sale of his ancestor's lands, on a fieri facias against those lands, in the hands of his executor.

Demand of money from.] In an action against a sheriff for the overplus of money levied under an execution, the plaintiff must prove a demand of the money before action brought.—*Ruggles v. Beikie*, 276 & 347.

Duty and liability of, on writs of execution.] It is the duty of a sheriff who levies money under a f. fa. to pay it over to the party

entitled thereto, and he cannot return the writ to the crown office, and pay the money into the hands of the clerk of the crown, and thereby discharge himself from liability to the plaintiff in the original suit.—*Shuter & Williams v. Leonard, sheriff*, 314.

Liability of, for not conveying lands sold at public auction under assessment law. Distress. Tender of sheriff's deed.] In case against a sheriff for not conveying lands sold at public auction under the assessment law, the declaration stated the sale on the 22nd July, 1830, and that "afterwards, and at the expiration of twelve calendar months from the time of such sale, to wit, on the 22nd July 1831," the plaintiff demanded a deed : *Held* good on general demurrer. *Held also*, that it was unnecessary to aver that there were no sufficient distress on the lands, or that a deed was tendered to the sheriff for execution.—*Spafford v. Sherwood, sheriff*, 441.

Trespass. Attachment. Justification of.] In trespass against a sheriff under an attachment, issued under the Absconding Debtors' Act against the goods of a third party, by whom they had been sold to the plaintiff before the attachment, the defence was that the sale was fraudulent and void against creditors under 13 Eliz. ch. 5., but the sheriff did not prove that any debt had been due from the absconding debtor to the attachment creditor : *Held*, that without the proof of this his justification was incomplete, and that the plaintiff would be entitled to recover.—*Grant v. McLean, sheriff*, 443.

Sheriff's deed. What evidence of, prima facie.] The sheriff's deed is prima facie evidence that

the writ was delivered to the sheriff, and the lands seized and sold under it, in an action of ejectment by a purchaser of lands sold under an execution.—*Doe Spafford v. Brown & Brown*, 90.

Sheriff's sale of land for taxes. Proof of arrears. Distress.] In ejectment by the purchaser of lands sold for taxes at sheriff's sale, under 6 Geo. IV. c. 7. it is necessary for him to prove that the writ to sell was grounded on the treasurer's return, showing arrears of taxes for eight years, and that there was no sufficient distress on the lands to levy the amount; and *semble*, it is also necessary to prove that the land had been "described or granted."—*Doe Bell v. Reaumore*, 243.

Quære—If a sheriff is entitled to poundage on a f. fa. against lands, where he advertises the lands, but before a sale the parties compromise.—*Gates v. Crooks*, 286.

Rule to return writ. Inclosure of writ after rule had expired. Attachment. Where a sheriff, being ruled to return a writ, enclosed it to the clerk of the crown, three or four days after the rule expired, so that it was not in the files when search made, but was introduced in open court by the clerk, the court refused the attachment for the purpose of making the sheriff pay costs.—*Andrews v. Robertson*, 304.

See "Poundage."

SLANDER.

Slander—office of an innuendo—inducement of prefatory matter—colloquium.—*Caverly v Caverly*, 338.

New trial refused.] In slander, accusing the plaintiff of larceny, and a verdict for 150*l.* damages, the court refused a new trial, either

on the ground of excessive damages, or that one of the principal witnesses for the plaintiff was shortly after the trial convicted of perjury and sentenced to banishment.—*Eakins v. Evans*, 383.

SURRENDER.

Surrender by tenant to the king—by act of law—by matter of record.] A tenant in fee may surrender his estate back to the king, by act and operation of law, or by accepting a new grant for the same land, or he may surrender by matter of record; but a surrender not of record, or a surrender by record founded on an invalid title, is insufficient.—*Doe McDonell et al. v. McDougall et al.*, 177.

SURVEY.

Allowance for road, Grant from the crown.] Where, in an original survey, an allowance for road had been made between certain lots, and afterwards, and before 1810, grants are issued from the crown making the allowance between other lots; *Held*, that the grants must be considered most correct, and that the plaintiff, to whom one of the former lots belonged, was entitled to recover for a trespass committed on that part of his lot claimed as an allowance for roads.—*Field v. Kemp*, 374.

SURVEYOR OF STREETS.

Time for bringing actions against. Statute Geo. IV., ch. 9, as to.] A surveyor of streets appointed under the provincial statute Geo. IV., ch. 9, does not come within the protection of the 34th section of the 50 Geo. III., ch. 1, which requires actions for anything done under the authority of that act to be brought within three months.—*McFarlane v. McDougall*, 73.

TAXES.

Ejectment by purchaser of land sold for. Proof required to support his title.] In ejectment by the purchaser of lands sold for taxes at sheriff's sale, under 6 Geo. IV. ch. 7, it is necessary for him to prove that the writ to sell was grounded on the treasurer's return, shewing arrears of taxes for eight years, and that there was no sufficient distress on the lands to levy the amount; and, *semble*, it is also necessary to prove that the land had "been described or granted"—Doe Bell v. Reaumore et al., 243.

TESTATOR.

Execution against his lands.] A judgment against an executor to recover de bonis testatoris, will warrant an execution against the testator's lands, on the return of nulla bona to the writ against goods.—Doe Jessup v. Bartlett, 206.

TIMBER, GROWING.

How far real estate.] Mere notice of the execution of a previous deed for the sale of growing timber will not defeat the operation of a subsequent conveyance of the land, if the latter be registered first. Growing timber is so far real estate that, to be severed from the inheritance by deed or devise, the conveyance or will must be duly enregistered to pass the interest intended to be conveyed.—Ellis v. Grubb, 611.

TITLE.

Possession of mother. Heir-Déath. Tenant at will.] The possession of a mother will not be considered tortious, as against the heir, being her own child, but will be treated as the possession of a guardian.

TROVER.

If at the death of a tenant at will his heir enter, such entry is tortious ; and if the heir die, and his heir enter, the original owner or his heir will be put to a right—Doe Moak v. Empey, 488.

Debtor in possession. His title after sheriff's sale.] A debtor in possession of lands which have been sold for his debt at a sheriff's sale, in quasi tenant at will to the purchaser, and cannot dispute his title ; and a third person defending as landlord, but shewing no privity between the debtor and himself, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself.—Doe Armour v. McEwan, 493.

Heir at law. Adverse possession. Where there is an adverse possession of land, an heir at law who has never entered cannot make a conveyance so as to enable his vendee to recover in ejectment.—Doe Dixon v. Grant, 511.

Title under will of devisee. Estate in fee. Estate for life.] *Semblé*, that a devise of lands to the testator's wife for life, to be at her full and free disposal to whomsoever she pleases, and out of which the testator's just debts are to be paid, gives an estate in fee, and not for life with a power of sale.—Doe Humberstone v. Thomas, 516.

Title of purchaser at sheriff's sale, under an irregular writ. It is irregular to issue a f. fa. against lands, until after the return of the execution against goods ; but as it is only an irregularity, a purchaser at sheriff's sale under the writ against lands cannot be affected by it.—Doe Spafford et al. v. Brown, 92.

TRESPASS.

Right of action in.] Where stone was tortiously removed and severed from the freehold, and cut and shaped into millstones: *Held* that the person who had so taken and worked them, could not sustain trespass against the owner of the land from whence they were taken, who had got them into his possession by directing the carriers of them to deliver them on his premises, as the property had not been changed by the work done to the stone.—*Baker et. al. v. Flint*, 89.

Evidence under general issue.] In trespass for driving against the plaintiff's horse, and killing him, the defendant cannot, under the general issue, give in evidence, that the accident happened from the plaintiff's negligence, or without any fault on the part of the defendant, but such defence must be pleaded.—*Macdonald v. Monk*, 20.

Pleas to two counts for cutting down trees—and carrying them away. Demurrer.] Where a declaration in trespass contained two counts—the one for cutting down trees, and the other for carrying them away—and the defendant justified as to the cutting down the trees in the said declaration mentioned, because the close in which the said trees were growing was his soil and freehold, whereupon, in his own right, he committed the said several trespasses in the said close, in which, &c., and the plaintiff demurred specially, because the introduction was inconsistent with the body of the plea, being in bar of only part of the trespasses, whereas the body was in bar of all, the plea was held sufficient.—*Ostrom v. O'Connor*, 571.

Right of purchaser at sheriff's sale of a crop of wheat to maintain. Possession.] A party purchasing at sheriff's sale a crop of wheat, may bring trespass against a person converting or injuring it, though he may never have received possession of the field.—*Haydon v. Crawford*, 583.

Vide "Pleading,"—*Smith v. Smith*, 215; *Thompson v. Breakenridge*, 170.

TROVER.

Rideau Canal. Lock keeper. Obstructing lumber. Tender of charges.] Trover lies against a lock keeper on the Rideau Canal for not delivering up lumber seized and detained by him under the provisions of the Rideau Canal Act, for obstructing the navigation, on a tender of the charges occasioned by such seizure, and the removal of the obstruction.—*Gould v. Jones*, 53.

Agent selling horses at a less price than authorized, liable for difference, in.] Where the defendant received two horses from the plaintiff to sell at a certain price, and without his assent or authority sold them at a less price; *Held*, that he was liable in trover for the difference.—*Priestman v. Kendrick and Bernard*, 66.

Conversion. New trial.] A. having been arrested at the suit of a third person, placed a mare in B.'s possession, on an agreement that B. should go, and if the party arresting proved a demand against A., by his own oath or by that of others, B. was to pay it, and keep the mare till repaid. B. did pay 10l.—but without shewing he did so in consequence of its being sworn to—and the mare remaining with him, he used her once in the plough. A. thereupon, with-

out demand, brought trover, alleging this use of the mare was a conversion, and obtained a verdict. The court granted a new trial without costs.—*Forrester v. Spencer*, 47.

TRUSTEE.

Release by executor. Its effects upon trustee.] A release by an executor who is also a trustee, does not release trustee.—*Doe Boyer et al. v. Clause*, 145.

Indorsement to trustees without naming them. Right of action.] An endorsement to pay to the trustees of an insolvent form, without naming them, is sufficiently certain on showing who they are, and that they act in that capacity, to vest the vote in them, so as to give their endorsee the right of suing upon it.—*Auldjo v. McDougall*, 199.

USRY.

Where A. having purchased a lot of land at sheriff's sale for 82l. and being unable to pay it, agreed with B. to give him a deed of this land if he would pay the sheriff, upon an agreement that if A. paid B. 132l. in three days, A. should have the land, and B., an attorney having an execution which he had no mode of satisfying but by getting something out of the proceeds of this land, made the advance on those terms, and receiving the 132l., paid over the 50l. to his

client: *Held* to be usury in B.—*McDonnell, q. t. v. Kirkpatrick*, 324.

VENUE.

Change of venue at the instance of Plaintiff, after issue joined.] The court will not change the venue on the application of the plaintiff after issue joined, unless a very special ground be laid for it.—*Crooks v. House*, 308.

WAGER.

Vide "Gaming."

WITNESS.

Uide "Evidence."

WILL.

Wife. Life estate.] Where a testator, after devising to his wife for life *all* his real estate, stated the lots of lands of which it was composed, and amongst others the front half of a lot, of which only the rear half belonged to him: *Held*, that the wife took a life estate in the rear half, under the general terms of the will.—*Doe Taylor v. Paterson*, 497.

Estate for life. In fee. Wife. Semble, that a devise of lands to the testator's wife for life, to be at her full and free disposal to whom and whosoever the pleases, and out of which the testator's just debts are to be paid, gives an estate in fee, and not for life, with a power of sale.—*Doe Humberstone v. Thomas*, 506.

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